IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, A. D. 1897

MERCANTILE TRUST COMPANY,

Complainant

vs.

CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY, *et al.*

Defendants.

IN THE MATTER OF THE APPLICATION FOR WRITS OF CERTIORARI BY THE INTERVENERS, THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, THE HUNTTING ELEVATOR COMPANY AND JACOB RAU.

Brief in Opposition to Granting of Certiorari.

BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for Respondents.

NOTE:- For convenience, all references are to the record in the Rau case; the same evidence being taken in all three cases.

Statement.

The intervener, the Chicago, Milwaukee & St. Paul Railway Company, was the owner of thirty-eight (38) cars mentioned and described in its petition. During the evening of the 28th day of October, 1894, while on the tracks of the Terminal Railroad Association of St. Louis, in its yards at East St. Louis, they were damaged by fire to the extent of $9,033 73.

The destination of these cars was shown by the way-bills, which accompanied them, except in a few cases, and in those cases by a copy of the shipper's receipt. It appears that no original shipper's receipts were issued, but that after the fire the shippers demanded receipts and the agent of the railway company would not issue one without marking it "copy" or "duplicate." These way-bills and receipts were introduced in evidence by interveners. As to all the cars, except five, the way-bills show that they were to be moved from their point of origin to East St. Louis, although in a column under the head of "marks and consignees" the name of the consignee and the words "St. Louis, Missouri," appear. As to one car, No. 46064, the way bill reads from Wycoff, Minnesota, to St. Louis. This, however, is apparently a mistake, inasmuch as the shipment consisted of that car and another numbered 43222, and the way-bill for the latter read from "Wycoff to East St. Louis." (They both arrived at East St. Louis, October 25th, the same hour

and train, 1:45 p. m. R. p. 259). In addition to this on the station receipts for these two cars, under head of marks and consignees, appears the words "The Orthwein Grain Company, East St. Louis." (R. pp. 171, 173.)

As to cars Nos. 10071, 34908, 10536 and 3218 the way-bills introduced in evidence read on their face "Way-bill of freight forwarded from Lake City to St. Louis." These four way-bills are marked "Copy" and there is nothing in the evidence to show that they are true copies or why the originals were not introduced. The cars went into yard at East St. Louis and were destroyed, along with other barley cars in store there.

The initials, numbers, route, origin and destination of the cars, were as follows:

Initials.	Numbers.	From	To	
C., M. & St. P.	32986	La Crosse, Wis.	East St. Louis	R. pp. 156-159
" " " " "	20022	" "	" "	
" " " " "	1100	" "	" "	
" " " " "	6842	McGregor, Iowa	" "	R. pp. 162-164
" " " " "	10720	" "	" "	
" " " " "	18126	" "	" "	
" " " " "	3728	" "	" "	
" " " " "	4126	" "	" "	
" " " " "	2598	" "	" "	
" " " " "	12336	" "	" "	
" " " " "	37506	" "	" "	
" " " " "	11836	Prairie DuChien, Wis	" "	R. pp. 167-169-173-174
" " " " "	33090	" "	" "	
" " " " "	16802	" "	" "	
" " " " "	12	" "	" "	
" " " " "	680	Wycoff, Minn.,	" "	
" " " " "	46064	" "	St. Louis	
" " " " "	43221	" "	East St. Louis	
(Station receipts for cars No. 46064 and 43222 under marks and consignees is "The Orthwein Grain Co., East St. Louis."				
C., M. & St. P.	43080	Lime Springs	East St. Louis	
" " " " "	32194	"	" "	
" " " " "	34574	"	" "	

Initials.	Numbers.	From	To	
C., M. & St. P.	17272	La Crosse	East St. Louis	R. pp. 368-370
" " " "	3524	Savannah	" "	
" " " "	31098	"	" "	
" " " "	33134	"	" "	
" " " "	2430	"	" "	
" " " "	31204	"	" "	
" " " "	46992	"	" "	
" " " "	15944	"	" "	
" " " "	6364	"	" "	
" " " "	12886	"	" "	
" " " "	10071	Lake City	St. Louis	
" " " "	34908	"	"	
" " " "	10536	"	"	
" " " "	3218	"	"	
" " " "	1232	La Crosse	East St. Louis	R. p. 169
" " " "	1154	Ossian, Iowa	" "	
" " " "	38108	" "	" "	

JACOB RAU.

The intervener, Jacob Rau, delivered to the Chicago, Milwaukee & St. Paul Railway Company on the 10th and 16th days of October, 1894, two (2) car loads of barley, Nos. 46064 and 43222; said barley was damaged or destroyed by the same fire, while in the yards of the Terminal Railroad Association of St. Louis, at East St. Louis, to the extent of $1 144.07; the said cars were consigned as follows:

No. 46064, from Wycoff to St. Louis, as shown by way-bill, but as shown by station receipt destination appeared to be East St. Louis; No. 43222, from Wycoff to East St. Louis. (R. pp, 48, 171, 172, 173.)

HUNTTING ELEVATOR COMPANY.

The intervener, the Huntting Elevator Company, delivered to the Chicago, Milwaukee & St. Paul Railway Company ten (10) car-loads of barley on the following

days: On the 24th day of September, 1894, cars Nos. 11836 and 33090; on the 13th day of October, car No. 34574; on the 15th day of October, car No. 32194; on the 18th day of October, car No. 43080; on the 12th day of October, car No 12; on the 20th day of October cars Nos. 178, 7285, 16802 and 46648; the said barley was damaged by the same fire to the extent of $2,600.56, while in the yards of the Terminal Railroad Association of St. Louis, at East St. Louis; the cars were consigned as follows: (R. pp. 49, 167, 168, 169, 173, 174)

Initials	Numbers	From	To
C., M. & St. P.	11836	Prarie DuChien	East St. Louis
" " " " "	33090	" " "	" " "
" " " " "	16802	" " "	" " "
" " " " "	46648	" " "	" " "
" " " " "	7286	" " "	" " "
" " " " "	178	" " "	" " "
" " " " "	12	" " "	" " "
" " " " "	43080	Lime Springs,	" " "
" " " " "	32194	" "	" " "
" " " " "	34574	" "	" " "

The foregoing statement is of facts upon which there is no dispute, the greater portion of which is stipulated. (R. pp. 46, 50). After the fire mentioned each one of the petitioners filed an intervening petition in the cause of the Mercantile Trust Company against the Chicago, Peoria & St. Louis Railway Company, pending in the Circuit Court of the United States for the Southern District of Illinois, in which C. H. Bosworth had been appointed receiver of the said railway company, and which railway, at the time of the fire, he was operating as such receiver. The petitions, however, make the railway company and not

the receiver party defendant, and aver that the property destroyed was at the time "in the possession of and under the control of the said defendant railway company" as a common carrier. (R. p. 34).

The defense is that the Terminal Railroad Association of St. Louis had actual custody, care and control of the property at the time of the fire which was caused, and the property destroyed, by its gross neglect. (R. p. 37).

The Terminal Railroad Association of St. Louis is a company owning tracks in East St. Louis and across the bridge into St. Louis, which connect the various railroads centering there. Its business is that of interchanging or hauling cars coming in on one railroad and delivering them to another railroad; also to haul cars destined to St. Louis from the termini of the several railroads in East St. Louis across the bridge into St. Louis. As a regularly incorporated common carrier it performed like service for all railroads terminating at East St. Louis, its only competitor being the Wiggins Ferry Company. The contract originally entered into between the Terminal Railroad Association and the Chicago, Peoria & St. Louis Railway Company contemplated only these classes of business, and fixed a charge for the same, *except cars on which the Terminal Company received a bridge toll, which were to be hauled free.* (R p. 39-111.) All the cars in controversy, were of the latter class.

When the petitioners filed their interventions in this cause the receiver was not fully aware of all the circumstances surrounding the particular shipments of grain referred to in the various petitions. He therefore was compelled to make the best answer he could in the light of his knowledge at that time. He filed his answer to all of them, alleging a delivery to the Terminal Railroad Association, in the due course of business, of all these shipments. Later on, during the taking of evidence, other facts were developed. To cover these the receiver filed an amended answer. In this amended answer he alleged that the shipments in question, at the time of the fire, had been delivered to the Terminal Railroad Association, and were under its sole custody and control for the convenience of the consignees. (R. pp. 58-60.)

The claims of the petitioners, except the Chicago, Milwaukee & St. Paul Railway Company, are for damages of barley shipments caused by the fire of October 28th, 1894. These barley shipments originated in Iowa, Wisconsin and Minnesota, at various points on the Chicago, Milwaukee & St. Paul Railway.

The barley was hauled by the Chicago, Milwaukee & St. Paul Railroad Company to Rock Island; there delivered to the Rock Island & Peoria Railway, and hauled to Peoria; there delivered to the Peoria & Pekin Union Railway, and hauled to Pekin; there delivered to the receiver of the Chicago, Peoria & St.

Louis Railway, and hauled to the terminus of its line in East St. Louis, and there delivered, upon the designated "Ys" of the Terminal Railroad Association, where the engines of the Terminal Association took the cars and set them on its own tracks at East St. Louis. (R. pp. 82, 198, 199, 204, 224, 227, 231, 241, 249.) At the time of the fire these cars had been accumulating at this last point for some time. One of them coming in as early as September 28, others about the middle of October, and others not until the afternoon of the night of the fire. (R. p. 259.)

This barley was to be sold again by the consignees, the grain brokers in St. Louis, and by arrangement between them and the Terminal Railroad Association it was held at the place where it was damaged until these sales were effected and a reconsignment of the barley made to the purchasers from the grain brokers. (R. p. 83, 155, 175, 260, 263, 265, 267, 204, 208, 228, 229, 234, 238, 249, 331, 334.) The periods for which these cars remained on the tracks at East St. Louis was controlled by the sale of the barley by the consignees, which in its turn was controlled by the state of the market. (R. pp. 206, 260, 263, 334.)

All of these intervening petitions were consolidated, and the evidence taken is to apply to them all. The master, after having heard and considered the evidence, filed a separate report in the case of each

petition, but inasmuch as nearly all the points in controversy are raised by the facts surrounding each petition, they have all been treated in one argument.

Upon hearing before the Master in Chancery he reported in favor of all of the interveners, to which reports exceptions were duly taken and filed. (R. p. 71.)

The matter then came on for hearing before the Circuit Court upon these exceptions, which upon consideration were overruled and decrees entered in favor of the interveners, in the amounts claimed by them, together with interest from the date of the master's report. (R. p. 73.)

From these decrees, appeals were prayed and perfected to the United States Circuit Court of Appeals for the Seventh Circuit, both by the receiver and the Chicago, Peoria & St. Louis Railroad Company of Illinois, the assignee of the purchaser of the railway property at the foreclosure sale (R. p. 357, 360). Said appeals came on for hearing in said Court of Appeals before their Honors, Judges Woods, Jenkins and Showalter and were argued, and subsequently, on the 25th day of February, 1898, the said Court of Appeals handed down its decision, wherein and whereby the said decrees of the United States Circuit Court for the Southern District of Illinois, were reversed (R. p. 403); his Honor, Judge Jenkins, dissenting therefrom (R. p. 386)

On the 27th day of March, 1898, the appellees in said Court of Appeals filed their respective petitions for rehearing (R. p. 407), which were subsequently, on or about the first day of April, 1898, overruled (R. p. 408).

From these decrees of the United States Circuit Court of Appeals the said appellees therein have made this application to this Court for writ of certiorari, upon three grounds, which we shall discuss in the argument following.

Argument.

The question submitted to the court on this application is whether or not the court will, in its discretion, issue a writ of certiorari for the purpose of reviewing the decrees of the Court of Appeals.

Opposing counsel have neither filed with their petition an assignment of errors or of variance; nor have they in their brief and argument cited authorities or made arguments in support of the granting a writ of certiorari in these cases. The only argument in support of the writ is to be found in the petition itself, where three reasons are alleged why the judgment of the Circuit Court of Appeals should not be allowed to stand as a final judgment in these cases.

I.

This is not a proper case for the issuing of a Writ of Certiorari.

We fully appreciate the fact that the issuing of a writ of certiorari by the Supreme Court of the United States is a matter almost entirely discretionary, and that therefore it is impossible to lay down rules which shall be binding in all cases. We desire however, to call the attention of this court to the fact that in *Forsythe vs. City of Hammond, 166 U. S., 506,* it being of the opinion that "a power so broad and comprehensive if carelessly exercised might defeat the very thought and purpose of the act creating Courts of Appeals," early prescribed narrow limits for its exercise. The language used by this Honorable Court in that case is:

> "Thus, while this power is co-extensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all courts of appeals, *it is a power which will be sparingly exercised,* and only when the circumstances of the case satisfy us that, the *importance of the question involved,* the *necessity of avoiding conflicts* between two or more courts of appeal, or between courts of appeal and the court of a state, or some matter affecting the interests of this nation in its *internal or external relations,* demands such exercise."

(a) The importance of the questions involved does not justify a review by this Court.

In their petitions opposing counsel urge as one of the reasons for this court taking the cases, the importance of the questions involved.

The elements which they allege as entering into the cases to make them important, are that the amount involved is large and the commercial interest involved is of a public character. The amount involved is about $20,000.00 (R. p. 177, 182); the commercial interests involved are those of certain barley shippers in the Mississippi Valley. Opposing counsel however argue that inasmuch as there are other shippers, whose goods may be similarly situated as these were, this fact changes the nature of the interest from private to public. If this argument is considered sound, the character of every litigation can be changed from private into public on the same grounds, and every suit therefore becomes of the greatest importance because there may be many other parties whose interest and property are similarly situated.

We know of no rule that has been laid down by which it can be determined whether the question involved in a litigation is of that importance which justifies the issuing of certiorari. We submit, however, that if this importance is to depend on its public character, litigation of private interests can not be changed

into public by simply saying that there are many other persons, whose property and interests are similarly situated with those of the particular parties in litigation.

It is to be remembered that this court citing *Re Woods 143 U. S., 202* in *Law Ow Bew vs. The United States, 144 U. S., 47*, said:

> "The Act of Congress of March 3, 1891, establishing Circuit Courts of Appeals and defining and regulating jurisdiction of the courts of the United States was passed to facilitate the prompt disposition of cases in this court and to relieve it from the oppressive burden of general litigation, which impeded the examination of cases of public concern, and operated to the delay of suitors."

From that quotation we glean two important announcements relative to the issuing of certiorari. The first, and that which is always to be kept in view, is that the Act of Congress establishing Courts of Appeal *was for the purpose of facilitating* the prompt disposition of cases in this court and *to relieve it from* the burden of general litigation. i. e, *litigation concerning private interests.* Second, that the cases which this court consider of sufficient importance to require them to be certified to it, *are those of public concern.* In the reports are to be found very few cases in which this court has expressed its reasons for granting or refusing certiorari, but in *Forsythe vs. Hammond, 166, U. S., 506*, practically all of such cases are reviewed. Upon these cases we must depend for the reasoning which moved the court to grant or deny certiorari.

Of those cases the only one in which the writ was granted because of the importance of the question involved was that of *Exparte Lau Ow Bew, 141 U. S., 583.* There the question involved was the construction of Acts of Congress in the light of treaties with foreign governments, *a matter not only of public but of international concern.*

In *exparte Woods, 143 U. S, 202,* the court denied the certiorari because the question involved was not of sufficient importance. saying:

> "But we do not regard the inquiry as to whether it was settled law in the State of Minnesota, that a judgment of dismissal in a former suit, such as pleaded here, was not a bar to a second suit upon the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the decisions of the Circuit Court of Appeals in reference to them."

If opposing counsel in that case did not, they could have, with as much force as opposing counsel do here, argue that there were hundreds of other citizens of Minnesota who had judgments of dismissal and their interests would be affected if the law of the State was not settled as to whether or not such a judgment was a bar to a second suit upon the same cause of action; or that there were thousands of servants in the State of Minnesota who were subject to the receipt of injuries daily, and therefore it was a

matter of public concern that the law should be definitely settled as to their rights on the trial of causes then pending or thereafter to be brought.

In *Chicago & Northwestern vs. Osborne, 146 U. S., 354*, this court denied petition for certiorari on the ground that the question involved was only a matter of private interest, and in speaking of that case in *Forsythe vs. Hammond, supra,* it said:

> "We have declined to issue writs of certiorari in cases where, there being only a matter of private interest, there had been no final judgment in the Court of Appeals. * * * On the other hand, in *United States vs. The Three Friends*, at the present term, *166 U. S., 1*, we issued a writ of certiorari in a case appealed to the Circtit Court of Appeals before any action had been taken by that court: but this was in view of the fact that the question involved was one affecting the relation of this country to foreign nations, and therefore one whose prompt decision by this court was of importance; not merely for the guidance of the executive department of the government, but also to disclose to each citizen the limits beyond which he might go in interfering in the affairs of another nation, without violating the laws of this."

Therefore it is to be seen that the test in all the cases in its relation to importance and gravity, is as to whether or not it is of a public nature *per se*. From the only light which the Supreme Court has given us thus far in this matter, we submit that it is not intended to take cases which operate on the public *only indirectly*. As we have argued above, all litigation is susceptible of such a characterization, and

therefore if the same is to be accepted, the *limit* which Congress placed upon the power of granting certiorari *is dissolved* by ingenious argument.

(b) The opinions of a majority of the Court of Appeals are not opposed to each other.

It is alleged in the petition (p. 15) as a reason why certiorari should be granted, that the opinions of the majority of the Court of Appeals are not entitled to any strong presumption of correctness because they are opposed to (1) each other, and (2) to the opinion of the District Judge in the Circuit Court

The only case in which it has been suggested by this court that a division of opinion of the judges of the Court of Appeals will justify a review by this court is that of ***Forsythe vs. Hammond, 166 U. S., 506;*** but there the division of opinion is not that which is alleged in the petition in this case. There this court said (p. 512):

> "As the Courts of Appeal would often be constituted of two Circuit Judges and one District Judge, a division of opinion between the former might result in a final judgment where the opinions of two judges of equal rank were on each side of the questions involved."

To bring the case at bar within the division of opinion suggested in ***Forsythe vs. Hammond***, it will be necessary to show that either Judge Woods or Judge Showalter was a District Judge, so that we would have in this case a District and Circuit Judge

on the Appellate bench in opposition to a Circuit and District Judge, the former on the Appellate bench and the latter on the Circuit bench. If this were alleged and shown to be the fact then we would here have a final judgment where the opinions of two judges of equal rank were on each side of the questions involved.

Such, however, is not even alleged. On the contrary it is simply averred that the opinions of the two Circuit Judges on the Appellate bench are opposed to the one Circuit Judge on the Appellate bench, and one District Judge on the Circuit bench. This is the inevitable result which will follow the reversal of any judgment of a Circuit Court, unless the judgment of the Court of Appeals happens to be unanimous. If every judgment of the Court of Appeals reversing the Circuit Court is not unanimous, then according to the logic or opposing counsel, it is subject to review by certiorari.

We do not believe, however, that a consideration of the opinions delivered by Judges Woods and Showalter, the two judges constituting the majority of the Court of Appeals will sustain the assertion that they are opposed to each other.

It is to be remembered that in the two lower courts four appeals were submitted and considered together. These appeals were the representative of

many other cases pending in the Circuit Court. The four cases submitted to the Court of Appeals presented two classes of shipment—the three involved in this application were barley shipments consigned to St. Louis brokers to be sold on "change," and the fourth case was a through shipment of merchandise destined to Alabama.

The major part of the opinion of Judge Woods consists in a consideration of three cars of barley shipments, and he reverses the decree of the Circuit Court which held the receiver liable for such shipments, on the ground that a certain agreement had been entered into between the consignees and the Terminal Railroad Association, whereby the latter was to hold these barley shipments on its rails in East St. Louis for the purpose of giving the consignees an opportunity of selling the same in the market, and thereafter give to the shipments a new destination As to the other case, that of the through shipment of merchandise, Judge Woods simply holds that inasmuch as the agreement did not have any application to it, the decree of the Circuit Court should be affirmed.

The major part of the opinion of Judge Showalter consists in a consideration of the liability of the receiver in the case of the through shipment of merchandise, and in demonstrating that a certain agreement entered into between the Terminal and the receiver did not constitute a lease of the rails of the latter to the

former, nor make the former the agent of the receiver, in opposition to the position taken by Judge Jenkins (not Judge Woods) that this agreement did accomplish such object.

The only opposition in the opinions of Judges Woods and Showalter is in the disposition of the case which involved the through shipment of freight—Judge Woods being of the opinion that the receiver was liable, and Judge Showalter that he was not liable. That case, however, is not before the court in this application.

In the consideration of these points it must always be born in mind that they disposed of two different classes of cases. On the barley question we have Judges Woods and Showalter concurring and constituting a majority, and in the through shipment case, we have Judges Woods and Jenkins concurring, and therefore constituting a majority.

We hardly think it necessary to comment upon the allegation in the petition (p 15) that the opinions of the majority of the court are opposed to those announced by the minority of the court and the Circuit Court. In the first place, the Circuit Court rendered no opinion, and in the second place, if it had, it would be impossible for the Court of Appeals to have reversed it without rendering an opinion which was opposed to it.

(c) This decision is not in conflict with other decisions.

As another ground for the granting of certiorari opposing counsel allege in their petition that the decision of the minority of the judges in this cases is in conflict with the decisions of the courts in

Pratt vs. Railway Co., 95 U. S., 43.
Covington Stock Yards Case, 139 U. S., 128.
Texas & Pacific Ry. Co. vs. Clayton, 51 U. S. A., 676.
Mt. Vernon & Alabama Ry., 92 Ala., 296.
Palmer vs. C., B. & Q., 13 Atlantic Reporter, 818.

The decision in the case at bar is: (1) that where barley shippers consign car loads of barley to commission merchants without notifying the railroad company that they, the shippers, are still the owners, the consignees have the right to change the original destination of the shipment; (2), that where the consignees enter into an agreement with a terminal railroad, by which the latter is to receive such barley shipments from the connecting carrier and hold them in storage for the convenience of the consignees and until the latter shall make a sale of such barley on a grain exchange, that there has been a sufficient delivery of such shipments by the connecting carrier to the Terminal Railroad, when, pursuant to custom, the connecting carrier deposits such cars on a certain designated "Y" of the Terminal Company and the

latter takes physical possession and control of such cars, by attaching its own engines to them and hauling them to a point on its own rails, there to await the convenience of the consignees.

In *Pratt vs. Railway Company, supra*, this court expressly recognized and announced the principle that where by custom or agreement there is a designated place of deposit between two connecting carriers, delivery is made by such deposit, although shipping directions had not as yet been delivered from the first to the second carrier.

The *Covington Stock Yards case, supra*, involved a controversy wholly foreign to the one in the case at bar. The main question determined there was whether a common carrier could be compelled to receive and deliver live stock at a platform or chute provided by the shipper, or deliver the same free from extra charge for its passing through the yards of the appellant. The court there said:

> "The railroad holding itself out to be a carrier of live stock was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it was consigned."

It cannot be said that the obligation "to provide suitable and necessary means and facilities for receiving" the barley from the receiver for shipment, "as

well as discharging" such barley "after it reaches its destination," had not been fully performed before the fire. If the receiver was under obligation by reason of his employment as a public carrier in addition to transporting the barley the whole length of his rails, to provide a distributing warehouse at a point beyond his own terminus, and there hold and store the grain subject to the convenience of the consignees, then the Covington Stock Yards case might become pertinent, and the rule there announced that it would not concern the shipper whether the receiver discharged this obligation, or employed the Terminal Railroad to do it, would be applicable.

But such storage of grain is no part of a common carrier's duty, and as Judge Showalter said of this case (R. p. 398):

> "In the *Covington Stock Yards Case, 139 U. S., 128*, it was ruled in effect, that a carrier bringing cattle to a consignee who had provided himself with structures connecting his yards with the railroad track, whereby cattle might be unloaded directly from the cars into his yards, could not refuse to unload the cattle of such consignee into the yards, and by means of the appliances provided by him, for the mere purpose of compelling him to pay a terminal fee at the cattle yards provided by the company, or provided by an independent corporation. This case, as I can see, has not here the application or significance suggested by counsel for appellees. Of the cars in question, one was to go to Birmingham, Alabama, the others, loaded with barley, to different points in and about St. Louis, as directed by the consignees. Appellant did not engage to furnish unloading facilities for these cars. He was under no obligation to these appellees to provide terminal facilities for unloading. He handled the cars of freight as an entirety."

To this we desire to add the further suggestion that the receiver not only did not engage, or in any way was such obligation upon him, to furnish unloading facilities for these cars, but from the very nature of the business it was never intended that these cars should be unloaded in the yards of any railroad. They were barley consigned to commission brokers who sold them on "change" to brewers and other consumers, to whom the cars would be dispatched, and in whose warehouses they would be unloaded.

The case of *Texas & Pacific vs. Clayton, supra*, is in perfect harmony with and follows that of *Pratt vs. Railway Company, supra*, and therefore, we submit, is also in harmony with the decision of the Court of Appeals in this case. There the court says:

> "It may be safely affirmed as a proposition applicable to all the cases, that a deposit of the goods, with notice *expressed or implied*, at any place where the second carrier has control, conformable with the usage created by the course of business between two carriers, is a sufficient delivery and discharges the first carrier."

That is the exact principle which the Court of Appeals applied to the facts in the case at bar.

In *Mt. Vernon vs. Alabama Southern R. R., supra*, the Alabama court holds that there can be no delivery from one connecting carrier to another, unless the second carrier has received full shipping directions. This, no doubt, is the general rule. We submit, however, that even if the court in that case had had an opportunity

to pass upon the exception to the rule, which is founded on agreement and custom, and had directly refused to have held that a deposit of freight pursuant to custom and agreement by one connecting carrier on the premises and into the physical possession of the other, was a sufficient delivery to have transferred the carrier's liability, such decision would have been in direct conflict with that of this honorable court in *Pratt vs. Railway Co., supra.* The Court of Appeals in this case would then have to either render a decision in conflict with the Supreme Court of Alabama, or with the Supreme Court of the United States, and we hardly think that under such circumstances the conflict of decision between the Court of Appeals and the State court would be sufficient ground upon which to grant certiorari.

We have not the case of *Palmer vs. C., B. & Q., supra,* before us, which opposing counsel contend conflicts with the decision in the case at bar. However, for the purpose of this argument, we may concede all that opposing counsel contend for as to such conflict, and the Court of Appeals would only have found itself in the same predicament as to choosing between a decision which is in conflict with a State court, or one which is in conflict with the Supreme Court of the United States. The only conflict in these cases is between the court and opposing counsel, and is a conflict of fact only.

We therefore earnestly submit that the petitioners have not brought themselves within the narrow limits laid down by this court for the granting of certiorari. Inasmuch, however, as opposing counsel have seen fit to go into the merits of the case in this application for certiorari, we are also forced to meet their argument, and accordingly, submit the following:

II.

At the time of the Loss and Damage the Liability of the Reciver as a Common Carrier had ceased

(a) The cars had arrived at their place of destination.

The contracts of carriage entered into with the railway companies on their face show that the goods were to be moved from the point of shipment to East St. Louis The only evidence on this point is the way-bills which were introduced by interveners, and which in all but five (5) instances read "Way-bill of freight forwarded from (point of origin) to East St. Louis." These way-bills are the papers by which these cars had been moved along their entire route, and were the only instructions which the receiver had for moving the cars from Pekin. It is true that in many of these way-bills, under the head of "marks and consignee," appeared the name of some commission firm "St. Louis

Missouri." ***But this in no wise controlled the movement of the cars.*** The way-bills said that the cars must be moved from point of origin to East St. Louis. The words appearing under the column of "marks and consignee" simply indicated who the consignee was and where he lived. This was for the convenience of the carriers, and not instructions to them to move bulk grain to the residence of the consignee. The destination was plainly and unqualifiedly East St. Louis.

(b) The consignees also designated East St. Louis as the destination.

If, however, we are wrong in our contention that by the contract of carriage East St. Louis was the destination, and the court can find in the contract itself, the intentions of the parties otherwise expressed, that the goods were to be delivered, not at the destination named in the head of the way-bill, but at the place of residence of the consignee indicated under the head of "marks and consignee," then we desire to call to the attention of the court the evidence, which we contend establishes the fact that the consignees themselves designated East St. Louis as the destination. If this evidence bears us out it proves one of two things: First East St. Louis was the destination, not only by contract of carriage, but also by the intention of the parties themselves; or, Second – that the consignee exercised his right to change the destination from St. Louis to East St. Louis.

The evidence which we refer to is the stipulation of record that the consignees. Otto Teichmann, Henry Grieve, L. Lemke and Charles Orthwein, would testify that the (260-2):

> "Terminal Railroad Association personally solicited this particular barley business, originating on the Chicago, Milwaukee & St. Paul Railroad, upon which this controversy is pending; that these solicitations by the Terminal Railroad Association were made to all the barley dealers in St. Louis to whom the particular consignments of barley were made which are now in litigation; that the Terminal Railroad Association, as an inducement to barley dealers and shippers, agreed to hold the cars on their tracks at East St. Louis, and offered other facilities in and about their yards at East St. Louis, by which the St. Louis Terminal Railroad Association succeeded in securing the business of all the shippers, by that term I mean the consignees and shippers, except the business of the John Wall Commission Company, whose business was being handled by the Wiggins Ferry Company, a competing line with the St. Louis Terminal Railroad Association, and that at a later day they also secured the business of this last named firm. And that this solicitation was made in the interest of the Terminal Railroad Association for the express purpose of having the business sent down the east side of the Mississippi River so as to give them the benefit of the transportation across the river at East St. Louis to St. Louis, in competition with lines west of the Mississippi River."

If it can be fairly contended the original destination was St. Louis, then it can not be denied that from the above stipulated evidence the consignees changed the destination to East St. Louis, and their right to do so only remains to be discussed. On this point, the weight of the authorities is thus summed up in *Ency. of Law, Vol. II, (1st ed.) p. 897:*

> "The right to demand a re-delivery by the carrier, or to change the original destination of freight, depends upon the ownership of the goods, and the notice to the carrier of such ownership. The rule is said to be that where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only for his interest, upon such terms as he dictates in regard to the delivery, and that the consignee is regarded simply as an agent selected by the consignor to receive the goods at a place indicated. Where the carrier has no notice of the ownership of the property other than that implied from the relation of the parties to each other as consignor and consignee, the latter is the implied owner, and the carrier is justified in taking his directions as to the manner of delivery."

In *Southern Express vs. Dickson, 94 U. S., 549*, the court held that inasmuch as evidence was introduced and the jury found the ownership was in the consignor, and that the railway company had notice of it, the railway was not justified in taking the directions of the consignee as to a change of destination, but interpreting the cases cited to sustain the right of a consignee to change the destination, the court said:

> "The numerous cases cited by the plaintiff in error, to the effect that any delivery to the consignee which is good as between him and the carrier is good against the consignor, are cases where the carrier has no notice of the ownership of the property other than that implied from the relation of the parties to each other as consignor and consignee. This gives to the consignee the implied ownership of the property, and hence justifies the carrier in taking his direction as to the manner of delivery."

Another case which seems to be on "all fours" with the cases at bar, is *London & Northwestern Railway Company vs. Bartlett, 7 H. & N. 400*, where wheat was held at the station by order of the consignee, instead

of being delivered at consignee's mill, according to the contract contained in the bill of lading. It was held that the carrier was exonerated for injury to wheat caused by delay in the station, in the absence of knowledge by it that the wheat belonged to the consignor; the court said:

> "It is, I think, quite clear that the consignee of goods may receive the goods at any stage of the journey, and I think that if the consignor directs the goods to be delivered at a particular place, it is a contract to deliver the goods at that place and not elsewhere. The contract is to deliver the goods there unless the consignee shall require them to be delivered at some other place."

Other cases were those of *Mitchell against Ede, 11 A. & E. 888; Foster against Frampton, 6 B. & C., 107*, which are decided on similar principles. Among the cases discussed by the court in *Southern Express Company vs. Dickson, 94 U. S., 549, was the case of Sweet against Barney, 23 N. Y., 335*, where a package of money was sent by express directed to "The People's Bank, 173 Canal Street, New York City." The package was delivered to an agent of the People's Bank at the express office, and was stolen from him. It was held that the delivery exonerated the express company from responsibility, since it had no notice that the money was not the property of the bank, the consignee.

Applying the above doctrine, the question to be determined is, did the carrier have notice that the consignor, and not the consignee, was the owner of

the goods. There is no conflict in the evidence. The intervening petitioners themselves testified that they in no way notified the carrier that they were the owners of the goods. (R. pp. 316, 322, 328, 336, 341, 345.)

The evidence of the consignees above, on stipulation, is fully confirmed, as will presently be seen, by that of other witnesses who were sworn in the cause in behalf of the receiver, and closely cross-examined.

The practical effect of such evidence is to strongly and conclusively establish an agreement between the consignees, either as owners, or as agents of the owners, and the Terminal Association by which the latter was to act as warehouseman, in taking and storing the goods of the former upon their arrival and deposit on the tracks of the latter at East St Louis.

The reasonable presumption that also arises upon the face of such evidence is that the duty of the receiver as a common carrier had been fully performed when the cars and their contents had been hauled to the end of the receiver's rails and set to the designate "Y" track of the Terminal Association at East St. Louis.

Such evidence also shows the motive and consideration influencing the Terminal Association to store the cars on its tracks at East St. Louis, without charge, *to be the control of the transportation*, upon

reassignment to its fresh destination, either to the owners across the river in St. Louis, or the various owners on the east side of the river.

(c) **The carrier was not required in the usual course of business, nor expected, to remove the freight from the cars.**

The evidence on this point is clear that it was the custom established by these very consignees to permit these barley shipments to stand in the yards of the Terminal Association at East St. Louis from two (2) hours to four (4) weeks or more. The reason for this was plain. The consignees were brokers, they were not consumers. They acquired the grain to resell. If the grain arrived before they had made a re sale, or if the "market" did not suit them, it was necessary to store it some place, and by arrangement with the Terminal Association the place of storage was designated as their tracks in East St Louis. It would have been not only inconvenient to remove the grain from the cars, but would have also caused great and unnecessary expense and delay, inasmuch as they themselves had no perfect control over the date of reshipping the barley, as that depended on the state of the "market." So it was greatly to their advantage to keep the grain in the cars ready to receive a fresh destination at the very moment they could make a sale. The evidence which establishes this custom, and which is uncontroverted, is found in the testimony of W. H.

Calvert, the agent of the Receiver at East St. Louis, which we quote (R. p. 252), and which shows that this custom has existed since the winter or early spring of 1891.

> Q. "You stated yesterday in the course of your examination as to these barley shipments coming to us over the Chicago, Milwaukee & St. Paul Railway, and probably as to certain other classes of property, the shipments in question were permitted to stand in the yard at East St. Louis, all the way from two hours up to four weeks or more; I will ask you to explain how this happened.
>
> A. "Well, the class of freight allowed to stand there consists of grain, (barley in particular) hard coal, pig iron and salt, and other commodities that are held on what we term the market; in other words, forwarded there (not in all cases, but as a rule) and held for the accommodation of the consignee, which is virtually for the interest of the shipper; the barley being held on commission to await an advance in the market. In other words, it comes in there, and if the market is all right when it arrives they sell it immediately, but as a rule hold it until the market suits them. It is, in other words, a port of entry for that class of goods at St. Louis.
>
> Q. "And is held to await the state of the market for the accommodation of the consignee?
>
> A. "For the accommodation of the consignee, which is virtually accommodation to the owner, it being handled on commission.
>
> Q. "How long has this barley business been carried on, and how long had that custom of shipment been in operation at St. Louis?
>
> A. "Well, since the C., P. & St. L. opened business in East St. Louis, which was in the winter or early December or January, 1891."

We also refer to the testimony of the same witnesses at R. p. 228, 229.

In further corroboration we quote also from the testimony of E. R. Stapleton, Chief Clerk of Calvert, at pages 204 and 205 of the record, as follows: (R. p. 204)

Q. "Do you mean to say that the receiver had control of these cars so far as placing them is concerned, or handling them?

A. So far as placing them or handling them he did not.

Q. Now, I will ask you whether cars billed, say from Wykoff, wherever that may be, to East St. Louis, with a memorandum on the face of the way-bill which stated the name of the consignee in St. Louis, whether the C., P. & St. L., when it delivered the cars at these yards in East St. Louis, had hauled them as far as they contracted to haul them?

(Objection.)

A. They had. The destination of St. Louis on the bill cuts no figure in the matter whatever; the cars are brought in there and held, and the consignee is served with a regular notice.

Q. Then it is the consignee directs?

A. The consignee directs where he wants them: a large portion go to Belleville or Highland or Hines Brewery—to different places.

Q. I will ask you whether or not the way-bill as to barley shipped on which you had had the name of the consignee in St. Louis was conclusive as to the ultimate destination of the car?

A. The barley shipment? By no means whatever.

Q. What became of it after placing it on the "Y"?

A. It would be hard to answer that question, because it goes to a thousand different places.

Mr. Hanson: In St. Louis?

A. St. Louis and East St. Louis both; no general place.

Q. Is this barley, any of the barley received from the C., M. & St. P. prior to the date of the fire, and about which he has offered some memorandum way-bills and so forth shipped to other points—East St. Louis?

A. Prior to the fire?

Q. I speak of prior to the fire.

A. Oh, yes.

Q. Who controlled as to the precise and definite point where it should be delivered?

A. The consignee in all cases.

Q. Then I will ask you what the custom was as between the C., P. & St. L. and the Terminal Railroad Association as to the further direction and final destination of the cars.

A. The cars would come in and be placed on the tracks in the Terminal Association yard wherever they saw fit; we would take the way-bill and notify the consignee that we had a car numbered so and so and loaded barley, "where do you want it?" That is about the substance of the notice. And at such time as he got ready he would send this notice back, endorsed on the back a great many times, send this car to Hines' Brewery or send it to Highland or some other point. Then we take and make out a way-bill; take that to Mr. Phelps and take his receipt.

Q. Was that a different and separate transaction having reference to the original contract between the shipper and the C., M. & St. P.; was it a new arrangement the consignee directed and controlled, or was it the original arrangement named by the shipper?

A. A new arrangement by the consignee, who placed orders with us to hold his barley."

Also the Receiver, C. H. Bosworth: (R p. 241.)

Q. "As Receiver, I will ask you to state between what points you undertook to haul that barley, and between what points you were paid?

A. "Peoria and East St. Louis.

Q. "What point in East St. Louis?

A. "It is difficult for me to state that. I should say in answer to that question that we can't haul it further than the end of our rails.

Q. "Where is the end of your rails?

A. "At the bridge junction, unless the stuff was expected to be delivered at our freight house or the yard tracks in connection, when it would be delivered to the Terminal Association.

Q. "I refer you to a certain blue print offered on behalf of the petitioners, and call your attention to three certain 'Y' tracks, upon which it appears from the statement of Mr. Calvert, Mr. Phelps and others, these C., M. & St. P. and other cars hauled by you to East St. Louis were delivered, and ask you whether or not you exercised any right of control as a common carrier beyond these three 'Ys?'

A. "That is the place where all of our deliveries were made to the Terminal Association, our engine would pull the train into those 'Ys' and their switch engine would take it from there.

Q. "Who had the care, custody and control after you delivered them on these three 'Ys'?

A. "The St. Louis Terminal Association, unquestionably.

Mr. Hanson: That is, that is your legal opinion?

A. "No; they actually had the cars and custody of the cars; we had no agents to attend to the movement of them, or no engines.

A. "What did the bills of lading say? (R p. 249.)

Q. "From Wykoff to East St. Louis with the name of the consignee in St. Louis.

A. "I should say that without any special understanding or knowledge about the business, our agent would have naturally taken the cars or had them eventually brought on the transfer tracks, which would be near our freight house in East St. Louis. It was known in all these cases the cars were subject to movement by rail by some railroad company and put in this yard convenient for that additional movement.

Q. "Was that separate and distinct, or was it a part of the original contract by which you undertook the freight?

A. "I should say not a part of the original contract; the contract provided for transportation to East St. Louis. We had fulfilled that part of it, and we had discharged our obligation."

Also Henry Rippe, one of the interveners: (R. p. 331.)

Q. "Upon receipt of this letter did you instruct your agent not to allow the shipments to be held in East St. Louis?

A. "I do not think I did.

Q. "What did you do upon receipt of the notice contained in this to-wit: 'All your shipments come via J., S. E. R. R. into East St. Louis, and are held there until disposition is given them, and they pay the transfer,' in regard to instructing your agent?

A. "I don't think I wrote them anything; I left it to their mode of doing business; I could not tell them what to do down there.

Q. "You allowed them to handle that end of the business?

"Yes, sir."

(d) No particular place of delivery was designated by the contract of carriage.

This must be conceded in any view that is taken of this case. It makes no difference whether the destination was St. Louis or East St. Louis. There is nothing in the way-bills to indicate what place in St. Louis or East St. Louis delivery was to be made. By the way-bills the freight was to be forwarded from a certain point to East St. Louis, and the name of

the consignee and his residence, "St. Louis, Mo.," was also noted therein. The only other evidence of the contract of carriage is the delivery of the goods to the carrier, and the shipping receipt. which were given to the shippers after the loss occurred. As to place of destination, the shippers' receipt will be found as indefinite as the way-bills, as they name only the consignee and the city in which he resides. without anything as to the particular point in the city where the goods are to be delivered.

There is nothing surprising in this. The absence of a designated place of delivery in the contract of carriage is not the result of negligence or mistake, but from the very nature of the shipments it was the intention of the parties not to designate a place of delivery. The consignees were grain brokers. Their business was buying and selling, not consuming. It would not be reasonable. therefore, to presume that it was the intention of the parties to have bulk barley delivered at the place of business of the consignees. Especially in view of the fact, fully disclosed in the evidence, that the consignee, after resale, and as necessary, directed reshipment and delivery to Hine's brewery, East St. Louis, or to Highland, or to Belleville, Illinois, or to the St Louis breweries, for all of which places East St. Louis was the designated "port of entry."

(e) Not only in the usual course of business, but also by special arrangement, the cars and their contents were placed on the tracks of the Terminal Railroad Association for the convenience of the consignees.

That there was in fact an arrangement between the Terminal Railroad Association and the consignees to hold this grain in the cars on the tracks of the Terminal Railroad Association at East St. Louis, we have shown above by a reference to the stipulation of facts entered into and of record. And that these cars and their contents were held on the tracks of the Terminal Railroad Association for the convenience of the consignees, we have shown by a reference to the uncontradicted evidence of W. H. Calvert, his chief clerk Stapleton, and by the letter of Orthwein to Rippe, Exhibit "G" (R. p. 334).

In the Court of Appeals, opposing counsel did not deny the existence of this agreement, but after having stipulated that the consignees would swear to it, sought to annul its effect by argument. They presented "three complete answers" to it. (Appellee's Brief, p. 23.)

> 1. "This barley was all consigned to either the Teichman Commission Company, St. Louis, or the Orthwein Grain Company, St. Louis, by way of East St. Louis. This is made certain by the stipulation between the parties of August 27, 1895 hereinbefore referred to; and had the witnesses been present and testified as stated by

> the counsel, their testimony would not have changed the effect of this stipulation, as to the destination of the barley."

We submit that the testimony of these witnesses does not change the effect of the stipulation referred to, as there is a radical difference between the person to whom a shipment may be "*consigned*" and the place to which it is *destined*. But if it be admitted that the original destination was St Louis, these witnesses were the consignees and *had the right to change the destination to East St. Louis.*

The second complete answer was:

> 2. "The consignees of the barley in question had no authority to bind the shippers, who were the owners, to any such arrangement."

This is a statement of law for which no authority is cited, nor can any be found. On the contrary, the law is well settled that the consignees had the undoubted authority to make the arrangement by which the destination was changed to East St. Louis, and the cars there held for a fresh contract of carriage.

(This brief *ante* p. 28 for authorities.)

Not only in this second answer without foundation in law, but it is also utterly without foundation in fact, as will appear from the testimony of one of the shippers, Mr. Rippe, from which it appears that the method of handling this barley business at East St. Louis was left entirely to the consignees.

"Q. What did you do upon receipt of the notice contained in this letter, to-wit: 'all your shipments come via J. S. E. R'd into *East St. Louis*, and are *held there until disposition is given them*, and they pay the transfer,' in regard to instructing your agent? (The Orthwein Grain Company.)

A. I don't think I wrote them anything: *I left it to their mode of doing business. I could not tell them what to do down there.*

Q. You allowed them to handle that end of the business?

A. Yes, sir." (R. p. 331.)

The third "complete answer" of opposing counsel was so complete that it answered itself. They argued that:

"until there had been a delivery * * * to the Terminal, it could not hold possession of it for the consignees. This is made clear from the testimony of Mr. Stapleton * * from which it appears that the custom was for him to notify the consignees of the arrival of the barley and ask them where they wanted it, *and upon* receiving this information, he would then make out a way-bill, deliver it to the agent of the Terminal and take his receipt."

It is well settled, however, that a carrier is under no obligation to notify a consignee of the arrival of the goods, and if the consignee does not appear to accept them the carrier may place them in storage at the consignee's expense and risk. With this in view, the question naturally arises, what was done with the goods between their arrival at East St. Louis and the

issuing of the new way-bill upon the order of the consignee. The reply is found in opposing counsel's "third complete answer," where they stated that:

> "until the consignees knew that the barley had arrived at East St. Louis, and the same had been delivered to the Terminal Association, they could not and would not give that company further orders for re-shipment."

Thus showing conclusively that even opposing counsel recognize that it was customary to ***make a delivery*** to the Terminal, and *after* such delivery had been made for storage, to notify the consignees, and then take their instructions for a ***new contract of carriage*** to a ***fresh destination.*** Is it not a little significant that these instructions ***were often sent direct to the Terminal?*** (R. pp. 207-208.)

Did these notices then amount to anything more than advising the consignees that their barley was in storage with the Terminal, awaiting their convenience for a sale and fresh destination? Was the receiver under any legal obligation as a common carrier, to send them? Surely not. The sending of these notices did not deliver the cars, and if the cars had actually been delivered, the *Terminal Railroad should not be permitted to escape liability for their care*, simply because the receiver had not continued to advise the consignees that their goods were where they had arranged to store them. However, the testimony shows that it was the custom to notify these con-

signees. (R. p. 204-5) and the presumption follows that they were notified. If they had not been, opposing counsel would have had them so testify.

(f) Petitioners abandon the position assumed in the lower courts.

Abandoning the argument by which they attempted, in the lower courts, to nullify this agreement between the consignees and the Terminal, they now take a new position, viz: that at the time the testimony was admitted they

> "had no thought, and not until it was argued in opposing counsel's brief on these appeals *did it ever occur to us*, that it could or would be *contended* that this informal stipulation, made in the hurry of and for the purpose of expediting a hearing, would or could be construed in such a manner as to cover the cars while they were yet standing and being held on tracks used by the receiver, under his agreement with that association." (Brief p. 21.)

If this agreement did not apply to the cars when they were burned, it surely would have been irrelevant and immaterial. But opposing counsel made absolutely no objection to its introduction on these or any other grounds.

For what purpose did opposing counsel think this agreement was introduced, if not for the purpose of "contending" that it covered these cars, *since they were the only cars in controversy?* We can see how the agreement might have been a shock and surprise to counsel when they came to give it mature considera

tion, but we do not see how it can avail them to say that they did not realize the purpose for which it was introduced, nor how they can thus avoid its effect.

(g) The agreement is an established fact.

In support of the petition for certiorari, it is attempted to belittle this testimony by referring to it as "the statement which counsel made" and as the statement of what counsel "expected to prove by certain witnesses," with the accent on the word "*expected.*" The existence of this agreement is an *established fact.* Opposing counsel admitted it in evidence without objection, and did not attempt to rebut it. We submit that it does not now become them to use language insinuating it to be a fiction. We had the promise of the consignees that they would attend and so testify; we relied on their attendance. They were outside the jurisdiction of the court and could not be compelled to attend. Not until the day before the hearing did these consignees inform our St. Louis agent that, *at the request of counsel for the Terminal Association,* they would not *voluntarily* testify.

We would have compelled them to testify (by deposition) if opposing counsel had not admitted our statement of what we "expected" to prove by them. It may be that counsel thought a ready admission on their part would make the testimony less effective than it would be were they to fight it stubbornly by

cross-examination with no hopes of breaking it down, or denying it on rebuttal. In fact, they did succeed in making the master overlook it entirely. But that did not take it out of the record.

(h) When new way-bills were issued time for storage had passed.

Opposing counsel argue that the testimony shows that the consignees had an agreement with *both* the receiver and the Terminal for holding barley at East St. Louis. This argument is well answered by his Honor, Judge Woods, where in his opinion he says: (R. p. 381.)

> "Whether the receiver, either in ignorance of the agreement of the Association with the consignees, or for other reasons growing out of the custom of business between the two companies, supposed himself to be in some sense responsible for the consignment in question, *is not material.* * * * *To a consignee who has provided a place for the receipt and storage of his goods, a carrier is certainly under no obligation to afford like facilities.*"

But opposing counsel say that the existence of these two agreements to hold the barley for the consignee should be reconciled in this manner, namely: (Brief, p. 26.)

> "that the arrangement which the consignee had with the receiver * * * was intended to apply while it was standing on the tracks which the receiver used between the *time of its arrival* at East St. Louis, and the *time when it was way-billed* over to the Terminal; and that the arrangement they had with the Terminal * * * applied to the cars of barley after they had come into the possession of that Association in the usual and customary way by the *delivery of way bills* * * * or

> to cars which the receiver could not hold on his tracks by reason of the limited space which he had contracted for being fully occupied * * * * ."

Reconciliation in this manner fails by reason of the fact that *after* the consignees gave instructions for a new way-bill *there was no storage necessary;* the cars immediately began a new transit. The storage, to be of any benefit to the consignees, was from the time the barley arrived in East St. Louis and was set on the tracks of the Terminal until the grain was sold and a new way-bill made out. *This was absolutely the only storage that could have been contemplated.* No cars were ever held in storage *after* the new way-bill was made out; *the way-bill itself started the cars on the new transit.*

The arrangement for storage could not apply to "cars which the receiver could not hold on his tracks by reason of the limited space, etc," since from opposing counsel's own view of this case, the receiver had tracks for one hundred and fifty cars, and at the time of the fire there were only seventy cars there. If such agreement is to be construed as applying to cars which the receiver *could not* put upon these tracks, then the agreement did not apply to any cars that were burned since such cars *were on these tracks*, and only seventy in number.

The evidence, however, is not conflicting. The "arrangement" which is referred to in the testimony of

the receiver's witnesses is the word used to distinguish between the original contract of shipment, and the action on the part of consignee in changing the destination. The word "hold," used by the witnesses, can only be construed as *arresting* the original transit of the barley at East St. Louis.

Therefore, instead of there being evidence of two arrangements with the consignee to "hold the barley in storage"—one by the receiver and one by the Terminal—the evidence is of (1) a *custom* on the part of the receiver to arrest the course of the original transit at East St. Louis, and of (2) an *agreement* between the consignees and the Terminal, whereby the latter was to *store* the barley *after* its transit had been *arrested.*

The *custom* is the result of the exercise by the consignees of their right to change the destination of shipments. The *agreement* provided for the care of the shipments from the time they were arrested until the consignees determined the new destination, which was when the barley was resold. The custom and agreement do not conflict and need no strained reconciliation, but one follows the other in natural sequence.

III.

If the Agreement to store the cars was between the Receiver and the Consignees, then the Receiver is not liable.

If we admit the strenuous contention of the petitioners, *here made for the first time in this litigation,* that the agreement to hold this barley in storage at East St. Louis was between the receiver and the consignees, even then the receiver is not liable for its loss. If this is so, the court can then deny this application for certiorari on the well settled principle, that if a decree is right, it can not be reversed simply because the reasoning assigned by the lower court is not sound.

(a) Such an agreement would at most make the receiver a warehouseman.

The question thereupon arises—when does the liability of a railroad as a common carrier cease, and when does the liability of a warehouseman attach? To answer the question and and to sustain the above deductions, we refer to the case of *Gregg vs. Illinois Central Railroad Company, 147 Ill., 550,* and quote the following from the opinion of the court delivered by Mr. Justice Shope:

> "The law is well settled in this state that the liability of a railroad company as a common carrier of

> freight, ceases upon the unloading of the goods from the car at the place of destination, and placing them in a safe and secure warehouse; *or, where the carrier is not required, in the usual course of business, or expected, to remove the freight from the car, as in the case of grain in bulk, coal, lumber and the like, by delivering the cars in a safe and convenient position for unloading at the elevator, warehouse or other place designated by the contract or required in the usual course of business; or, if no place of delivery is thus designated or required, on its side track, in the usual and customary place for unloading by consignees.*"

In support of the foregoing, the Supreme Court of Illinois in that case cited with approval many cases In stating the above doctrine it says:

> "In all such cases the question to be determined is whether anything remains to be done by the carrier in completion of its contract to safely carry and deliver the goods at the place of destination. If there is, its liability as a common carrier continues; if there is not, and the goods remain in the possession of the carrier, its liability in respect thereto, when not varied by contract or usage, is as a warehouseman only."

Let us apply that well accepted test to the facts in the case at bar. Did anything remain to be done by the receiver of the Chicago, Peoria & St. Louis Railway Company in completion of his contract to transport the cars and their contents from Pekin, Illinois, and safely carry to, and deliver them at East St. Louis. We contend that in the handling of this class of business the lines were well established in two ways: First, by the ordinary and usual course of business, which had been in existence for three years; and, second, by the express arrangement between

consignees and (admitting for the sake of argument) the Receiver; and the lines so established were that the receiver was to haul the cars and contents from Pekin to the end of his rails in East St. Louis, and there place them on certain designated "Ys" in a position to be attached to by an engine of the Terminal Association, which engine was to haul them in, break up the train and deposit the cars on tracks of its own, where they were to await a fresh destination from the consignee. This, the uncontroverted evidence shows, was faithfully done. We have fairly and fully met the rule in the *Gregg case*, and shown that the receiver was "not required in the usual course of business or expected to remove the freight from the cars," and that the receiver did safely deliver the cars at the "place required in the usual course of business."

(b) In the performance of the original contract, nothing remained to be done by the Receiver.

In the application of this test below, it was argued by opposing counsel that one act remained to be performed by the receiver, and that was, he should deliver to the Terminal Railroad Association new way-bills or manifest showing fresh destination of the cars. In reply to this our contention then was, and now is, that such new way-bill was the creation of a new contract of carriage, and not the

performance of any act of the original contract of carriage. The relations of the receiver to such new contract might be those of agent, in that behalf, for the consignee or consignor, but not those of a carrier.

It was also contended that, after the receiver set the cars in question, on the "Ys" of the Terminal Association at East St. Louis, there remained the further duty of notifying the consignee of the arrival of the goods. But that contention is met by: (1) the decisions of the Supreme Court of Illinois, beginning with *Railroad Company vs. Scott, 42 Ill., 139*, which hold that a carrier is under no such duty; and, (2) by the *presumption* that such notices were sent, which follows from the evidence of the *custom* so to do.

It may also be contended that there remained for the receiver to obtain the direction of the consignee as to where the consignee desired the cars to be finally sent. The reply to this is again, that such directions came only after the original consignee had sold the goods in question to a third party, either by private sale or on the Board at St. Louis, and when such direction did come *it was the beginning of a new contract of carriage;* the goods became the subject of a reshipment, the consignee became another person, and the destination was altered accordingly.

Thus, all the acts of the receiver in connection with the barley or cars containing it, after they had been set to the tracks of the Terminal Railroad Asso-

ciation at East St. Louis, were acts, not performed in the execution of the original contract of carriage from the shipper to the commission broker, but were incident to a new and distinct contract of carriage from East St. Louis to the destination indicated by the consignee, and in which the consignee of the original contract became the consignor, and the purchaser became the consignee. That the duty of the receiver in that behalf was simply the transmission by him of the instruction of the original consignee to the Terminal Association, is clearly shown by the following evidence of the witness Calvert (R. p. 234):

> Q. "I omitted to ask you as to these cars coming to the C. P. & St. L. from the C. M. & St. P., how long, as a rule, the consignees left them there.
>
> Objection. Incompetent, immaterial, irrelevant, not in the issue.
>
> A. That is a pretty hard matter for me to give an intelligent answer on.
>
> Q. Shortest and longest time?
>
> A. There is a great many of the cars we have orders for before they arrive, giving us designated points for their delivery. Then there is a great many of them we do not get orders on for some time. Furthermore there is one or two of the firms there that place an order at the beginning of the season to give either the Wiggins Ferry Company or the Terminal Railroad Association all their business, which is then held by the Terminal Association or the Wiggins Ferry Company, and forwarded on to the destination by orders direct from the consignee—either the Wiggins Ferry Company or the Terminal Association. I should judge the average of that barley business would be, well, I will say a week. That is simply my guess.

Q. Give the shortest time and the longest time, then the average in your opinion.

A. Some of them would stay there for thirty days; and then some would go right through without stopping.

Q. Dependent on?

A. Dependent on the condition of the market, and the market was governed altogether by the condition of the weather. During the warm weather they wouldn't unload; if we got a cold spell we would get a rush on barley; warm, slack up.

Q. After cars arrive you put them at the designated place of deposit on these Y's, by means of your engines. I will ask you whether or not you proceeded to take the direction of the consignee pursuant to the way-bill that accompanied the car, as a new matter outside of the way bill and for the convenience of the consignee?

A. New matter altogether. All barley business handled under special instructions issued by the consignees of the shippers. Fresh way-bills to use; not so all of it; some, where it was billed directly through, of course, not stopping; didn't ask the consignees for the disposition of that, but that is only to a brewery, for instance, that may know just how much they want to use, and have it billed that way; but (as to) all the other firms, go and get special orders from the consignees."

Cross-Examined.

Q. Then with such a bill marked Teichman Commission Company, St. Louis, Mo., before you refer the matter to the agent at Wycoff, where the shipment started, you will find out where the Teichman Commission Company was, and where you could make delivery of the cars?

A. Yes, sir.

Q. This testimony you have been giving with reference to custom applies generally to shipments of barley?

A. Yes, sir; so far as the C., P. & St. L. is concerned. Can't answer as to the custom on other roads.

Re-Direct

Q. I will ask you, would you have undertaken to send this car to St. Louis if you didn't get the direction?

A. No, sir; because I would have had no guide.

Q. East St. Louis was the destination?

A. Yes, sir; until we received orders from the consignee as to the final disposition.

Re-Cross.

Q. You would seek out information to enable you to make delivery of the contents of that car?

A. Yes, sir.

Q. Taking this way-bill as a starter to find out?

A. Yes, sir.

Q. The only means you had?

A. The only means I had of learning to whom I should go for the order.

Re-Direct.

Q. "It is suggested by the receiver, who is present, and I will ask you if it is not and was not the ordinary way of billing these cars, to bill them to East St. Louis and then leave the consignee to direct you as to how or by what route they were to be shipped further to the final point of disposition?

A. "That is the custom of billing on lines entering East St. Louis."

Upon the above evidence, supported also by that of Stapleton, the receiver, and the consignees, we submit this fair conclusion:

The acts of the receiver subsequent to placing the cars at the "Y's" of the Terminal Association at East St. Louis, were not acts performed in connection with

the execution of the original contract of carriage, and therefore can not be said to be acts which remained to be done by the carrier in relation to such original contract.

In *Railroad vs. Montgomery, 39 Ill., 335*, it appeared that hay was placed on cars one Friday; on the next morning the conductor of the freight train was about to take it away, when the consignor said he did not wish it to go until he could see the person to whom he had sold it. The cars were left, and on the next day the hay was destroyed by fire from a passing locomotive. On this state of facts, the court said: (p. 337.)

> "the technical liability of a common carrier does not attach until the delivery to him of the property is complete. If, for example, the same person is common carrier and warehouseman, and he receives goods to be forwarded when he has orders from the owner, his liability in the meantime is that of a warehouseman, and not that of a common carrier."

This principle is well established.

Cairns vs. Robbins, 8 M. & W., 258.

Pittsburgh vs. Barrett, 3 Am. & Eng. R. R. Cases, 256.

Michigan R. R. vs. Northern R. R., 7 Mich., 515.

O'Neil vs. N. Y. Cent., 60 N. Y., 138.

Barron vs. Eldredge, 100 Mass., 455.

Nichols vs. Smith, 115 Mass., 332.

Hutchinson on Carriers, § 82.

Angell on Carriers, § 134 and note.

This principle is also forcibly illustrated and applied by the Supreme Court of the United States in *St. Louis R. R. vs. Knight, 122 U. S., 79.* There it appeared that one Potter was a cotton broker at Texarkana; that he bought most of his cotton at points in Texas, on railroads running into Texarkana; that it was brought to Texarkana on the railroads, and delivered on the platform of a compress company, to be compressed before being reshipped north and east; after arrival on the platform it was weighed, classed and marked by Potter, after which *the railway company* was to compress it before shipping north, and pay for the compressing; after being compressed it was set out on the loading platform, and was then shipped to such consignees as Potter directed; when the superintendent of the compress certified that cotton had been delivered for compress, the railway company issued bills of lading therefor to Potter. The cotton accumulated faster than it could be compressed and shipped.

In that case it was held that the liability as a carrier did not attach until Potter had designated the consignees, although bills of lading had already been issued by the railway company. The court says:

> "It may be said that the defendant's liability as a common carrier commenced at a time antecedent to the delivery of the cotton to be loaded on the cars; that it might have arisen on a prior delivery of the cotton in question in the warehouse to be compressed, and then transported, *the duty of compressing it, in order to prepare it for transportation, having been undertaken by the defendant,*

> This, however, could only be when the specific goods, as the property of the plaintiffs, were delivered for that purpose into the exclusive possession and control of the defendant. Such was not the case in the present instance. No specific bales as the property of the plaintiffs, separate from all others, were delivered to the defendant for them *until the 525 bales in controversy were set apart and delivered to the defendant for immediate transportation on its cars;* and prior to that time all cotton received in its warehouse to be compressed, was received as the property of Potter, on his account, and subject, so far as grading, classifying and marking were concerned, to his control, *and none of it could be considered as having passed into the possession of the defendant as a common carrier* for transportation until designated and set apart by Potter or his agents."

In the case at bar, the cars and contents were awaiting a fresh destination, which could only be ascertained after the consignees had sold the barley and indicated who the new consignee was to be. Until these acts had been performed by the consignees, *whoever* held the cars and contents, held them simply as warehouseman.

But in the *Knight case* we find further facts which bring the two cases even closer together, if possible. The court there continues:

> "The cotton received at the company's warehouse came consigned to Potter upon bills of lading issued by other railroad and transportation companies at the point of shipment for delivery to him at Texarkana. Supposing, as one view of the evidence authorizes, the bills of lading were issued by the agents of the defendant to Potter in advance of the actual delivery of the cotton in the warehouse, on the faith of the bills of lading produced and surrendered by him, given by other carriers; still, the cotton as it came and accumulated in the warehouse for the purpose of being compressed, continued to be the property of Potter, subject to his control in the

respects already mentioned; and until specific lots were marked and designated, so as to correspond with the bills of lading previously issued by the defendant, *the latter had no possession of the property as a carrier.*"

It is because there remained something to be done by the consignees, before the cars could be moved from East St. Louis, where they were deposited on their arrival, that we submit, no matter who had possession, *such possession was not that of a carrier.*

(c) Where the consignees are accustomed to use the warehouse of the carrier, the transit ends when the goods arrive.

The principle is also well established that where the consignee, having no warehouse of his own, is accustomed so to employ that of the carrier, the transit ends when the goods arrive and are set at the usual place of storing, even though they immediately received a fresh destination.

In *Foster vs. Frampton*, 6 *B. & C.*, 107, where goods are to be delivered to the vendee at a particular place, the transitus in general continues until they are delivered to him at that place. But if he, by his own act, prevent the delivery, which otherwise in the ordinary course of business would take place, and does any act equivalent to taking possession, the transitus is thereby terminated. And, therefore, where the vendee of several hogsheads of sugar, upon receiving from the carrier notice of their arrival, took samples

from them for his own convenience, and desired the carrier to let them remain in his warehouse until he should receive further directions, and before they were removed, the vendee became bankrupt, it was held that the transitus was at an end.

This principle is well illustrated in cases involving the right of *stoppage in transitu*, since it is well established that such a right does not exist unless the goods are still in transit and have not been delivered to the consignee.

In *Scott vs. Pettit, 3 Bosanquet & Pullier, 469*, it appeared that on the 16th day of March, goods were forwarded from Manchester addressed to A, at the Bull Inn, London, in consequence of a previous order from him. On the 23d of the same month the goods were sent to the defendant's house, as the packer of A, the latter having given no direction at the Bull Inn respecting these particulars goods, but having given a general order that all goods addressed to him should be sent to the defendant, A having no warehouse of his own. On the 11th day of March, A committed an act of bankruptcy. When the goods arrived at the defendants, they were booked to the account of A, and the defendant not knowing of A's bankruptcy, unpacked the goods to ascertain their contents. On the 31st day of March, the goods were claimed by the consignors, and on the day after by the assignees of A, against whom the commission had been taken out.

The consignors claimed the right of *stoppage in transitu*, to support which it was necessary to show that the goods had not been delivered to the consignee. The court, however, held that the *transitus* of the the goods was at an end when they arrived at the defendant's house; and consequently, that the consignor's right of *stoppage in transitu* did not exist, and that the plaintiffs, as assignees of of A. were entitled to recover them in an action of trover. The court said, p. 472:

> "In this case it seems to me impossible to raise a doubt, whether the transit was at an end or not: for if the bankrupt had no warehouse to receive the goods, but that of the packer, the transit never could be at an end, if it did not end there. * * * * *
>
> If the bankrupt in this case had possessed a warehouse of his own, and the packer had merely taken them as a middle man, the consignors might have stopped them. But there being no other place of delivery but the warehouses of the packer, the goods when received there had gone to their last place of delivery, and consequently were no longer subject to the right of *stoppage in transitu*. * * *
>
> If the warehouse of the packer was not to be considered as the place of delivery of the bankrupt in the case, there could be no place of delivery at all, for the bankrupt had no other opportunity of receiving the goods but by the hands of defendant." (p. 473.)

Another case in which the same question is presented, is that of *Rowe vs. Pitford, 8 Taunton, 83*. There it appeared that a trader in London was in the habit of purchasing goods at Manchester and exporting them to the Continent soon after their arrival in London. The goods so consigned to him remained in

the wagon office of the defendants, who were carriers, until they were removed by his agent for the purpose of being shipped. The consignments of goods for the trader was delivered to the defendants on the 9th and 12th of August; on the 14th and 17th inst. the goods arrived at the wagon office of the defendants, on the 16th or 17th inst. the trader became bankrupt, and, on the 19th inst., notice of non-delivery to the bankrupt was given by the consignor to the defendants, who, according to order, delivered the goods, on the 21st, to a third house. The assignees of the bankrupt, the consignees, brought an action to recover the goods, and it was there held that they were entitled to the same, and that the right of the consignor to ***stoppage in transitu*** ceased on the arrival of the goods at the wagon office of the defendants in London. In support of the conclusion there arrived at, the court said, p. 85:

> "In *Richardson vs. Goss*, 3 *B. & P.* 127) *Chambre, J.*, said that he was strongly inclined to think, that, if a man be in the habit of using the warehouse of a wharfinger as his own, and make it the repository of his goods, and dispose of them there, the journey would be at an end when the goods arrived at such warehouse; and, in *Scott vs. Pettit*, 3 *B. & P.* 472) *Lord Alvanley* said, he perfectly coincided with *Mr Justice Chambre* in that which he had intimated in the former case. Both these cases were recognized in *Dickson vs. Baldwin*, (2 *B. & P.* 578) and there were confirmed by *Lord Ellenborough*."

In *Allen vs. Gripper*, 2 *Compton & Jervis*, 218, this principle is applied to a state of facts ***strikingly similar*** to that in the case at bar.

Lord Lyndhurst, C. B., says: (p. 220)

"The facts of the case are shortly these: Pestall had been in the habit of employing defendants for several years: and the course of dealing appeared to be, that the oil cakes were carried to Hertford, in the defendant's barge, and deposited in the defendant's warehouse, generally, for many months. * * * * * There was also evidence to show that they were so deposited *for the convenience of Pestall, that they might be distributed to his customers*, many of whom resided in the neighborhood. * * * * On this state of facts it appears to me, that the *transitus* was at an end."

On the same question *Bailey, B.*, says: (220)

"It appears by the evidence that the defendant's warehouse was the place at which these goods were to stop, and that the warehouse was to be considered, for the purpose of depositing these cakes, as the warehouse of Pestall, the purchaser. *The goods were not to be forwarded to Baldock* (where Pestall carried on his business) *without fresh orders; and they were to go*, according to the evidence in the cause, *to Baldock, or the customers of Pestall, as he should direct*. He thus had the complete power of giving a new destination to the goods, *and when they arrived at the place where they were to await such fresh destination*, the *destination* contemplated by the plaintiffs and Pestall *was at an end*."

(d) By arrangement the consignees used the tracks of the Terminal Association for warehouse purposes.

In support of the above we refer again to the stipulation as to the evidence of the consignees, and the testimony of W. H. Calvert, found at page 252 in which he says:

"Well, the class of freight allowed to stand there consists of grain, barley in particular, hard coal, pig iron and salt, and other commodities that are held on what we

> term the market: in other words, forwarded there (not in all cases, but as a rule) and held for the accommodation of the consignees, which is virtually for the interest of the shipper: the barley being held on commission to await an advance in the market: in other words, it comes in there, and if the market is all right when it arrives, they sell it immediately, but as a rule, hold it until the market suits them."

The above evidence stands uncontradicted. From it there is but one logical deduction, and that is that the barley was held on the tracks of the Terminal Railroad Association, in their yards at East St. Louis, free of storage for the convenience of, and for the purpose of giving the consignees an opportunity to sell the same, when they thought the market had reached its highest point, and after selling the same, to re-consign it in the same cars to the purchasers.

The moment the Terminal had attached its engines to these cars, *there was a physical delivery of the cars and contents to it*, to hold the same awaiting further instructions, *not from the receiver for a continuance of the original contract of carriage, but from consignees for a fresh destination and new contract of carriage.* If the agreement to hold them there was with the receiver, he held them as a warehouseman only.

(e) **Being sued as a carrier recovery can not be had as a warehouseman.**

The allegations are specific that the property was in transit. If this is so, the liability charged is that of a carrier, and to recover under such an allegation

the proof must show a breach of a common carrier's duty. We quote from one of the petitions, all of which are the same as to the liability alleged: (R. p. 25.)

> "there delivered to the Chicago, Peoria & St. Louis Railway Company, to be *transported* by it to destination; that the said last named company received said two car loads of barley, and *transported* the same as far as East St. Louis, a station on its line, *and while the same were in transit and on their way to destination*, and in the possession and under the control of said last named railway company, the said two cars containing said barley were destroyed by fire * * * * *"

Irrespective of the question in whose possession they were, the evidence is conclusive that they were being held at East St. Louis, subject to the orders of the consignees for a new destination.

It is certainly fundamental that the recovery must be on the liability charged in the pleadings. It would have been impossible to have charged the appellant with the liability of a carrier and warehouseman at the same time, i. e., the time the goods were destroyed; the goods could not have been held both as carrier and warehouseman; it must be one or the other. The selection was made, and cannot now be changed.

In *St. Louis R. R. vs. Knight*, 122 U. S. 79, the defendant was sued as a common carrier, and as in the case at bar, the evidence showing something re-

maining to be done by the shipper, the plaintiffs attempted to fall back on the warehouseman's liability. But the Supreme Court would not permit it, saying:

> "The suggestion in the charge of the Court of a possible ground of liability on the part of the defendant as a warehouseman, *was entirely outside of the issues.* The defendant was not sued upon the ground of any such alleged liability. No facts and circumstances, out of which any duty as a warehouseman could arise, were set out in the declaration; the action was upon the bills of lading alone. The contract alleged to have been made and broken, was contained in them. The duty charged to have been violated was the duty of defendant as a common carrier for an alleged negligence in the transportation of the goods. And if the defendant could be supposed, upon the facts proven, to have incurred liability in its character as a warehouseman, as distinguished from its capacity as a carrier, that liability was not incurred in respect to the plaintiffs. *It is not charged that the defendant, as a warehouseman, received any goods as their property for the purpose of storage and safe keeping.* Its relation as a warehouseman was with Potter, and him alone. *It was an error, therefore,* in the court to charge the jury that the defendant might be charged in this action for the loss in question upon its responsibility as a warehouseman to the plaintiffs."

It may be contended that the amended petitions charge the receiver with the liability of a warehouseman, but this contention cannot be sustained. The amended petition, (R. p. 57) as a premise, *restates* "all the allegations contained in the petition of each one of the foregoing interveners, as hereinbefore made and filed herein," all of which expressly aver that the cars were consigned to St. Louis, Missouri; that the cars were *in transit;* that they were in the possession of the receiver *for transportation; and stating facts which negative the theory that the possession was for storage.*

If the cars were not at their destination, but were in course of *transportation*, the mere fact that *incidental* to a delivery to the next connecting carrier, storage was necessary, *does not change the character from carrier to warehouseman*. This is decided in *Railway Co. vs. Mfg. Co., 16 Wall., 318*. Pleadings must be construed as a whole; by express allegation this amended petition is made a part of the original petitions; and the pleading as a whole must be construed strongly against the pleader.

Therefore, even if the facts set out in the amended petition, are such as aver a storage of these goods, that storage was performed as incidental to the carriage, and the possession was that of a carrier *and not of a warehouseman*. The recovery, therefore, must be as a carrier, and not as a warehouseman.

If the pleadings charge the receiver as a warehouseman, it is for the breach of a duty owing to the consignors. Under the evidence, the duty to warehouse was for the benefit of the consignees; no storage was contemplated in the original contract for the consignors. Therefore, any breach occurring in that respect is to the consignees, and as was said in the *Knight case, supra*:

> "Its relation as a warehouseman was with Potter, *and him alone*. It was error, therefore, in the court to charge the jury that the defendant might be charged in this action for the loss in question upon its responsibility as a warehouseman *to the plaintiffs*."

So we say here, if any relation as a warehouseman existed, it was with the consignees, *and with them alone*, and it would have been error to permit the consignors to recover on the liability of a warehouseman.

(f) The execution of such an agreement would have constituted delivery to the consignees.

If, as contended by opposing counsel, this agreement to store the cars on these particular tracks, was entered into between the receiver and the consignees, it was independent of the original contract of carriage, since there is no common law duty imposed on a carrier to store barley (the destination of which has been changed) for the purpose of permitting the consignees to sell it when the "market" suited them—and was tantamount to the consignees providing for the receipt and storage of such barley. As His Honor, Judge Woods, says in this case: (R. p. 381)

> "Neither is it important, if true, that the Terminal Association undertook to furnish terminal or yard facilities which it was the duty of the receiver's company to provide. If otherwise there would have been such a duty on the receiver, he was relieved of the duy in respect to these cars by force of the agreement between the consignees and the Terminal Association. To a consignee who has provided a place for the receipt and storage of his goods a carrier is certainly under no obligation to afford like facilities; and if by reason of an independent contract the carrier has a right to make delivery or to store goods in the same place provided by the consignee, the carrier does not on that account remain responsible to that consignee for the safety of his goods after depos-

> iting them in that place. These consignees having bargained with the Terminal Association to hold their cars upon its tracks, the tracks became theirs for that purpose, just as much as otherwise they would have been the tracks of the receiver under his agreement with the Terminal Association, and the cars having been placed upon those tracks, the receiver's possession and responsibility ceased, as they would have ceased if the cars had been placed on private tracks of the consignees; and whether way-bills had been handed over or remained in the possession of the receiver could be of no possible significance."

This conclusion of Judge Woods, that the tracks became private tracks of the consignees, follows just as logically irrespective of which railroad the agreement was made with by the consignees, and is in harmony with the rule laid down as to cars in *Railway Co. vs. Railway Co., 123 Ill., 594*, cited at page 37 of opposing counsel's brief.

Let us take opposing counsel on their own argument: They base their right to recovery in these cases on the contention that the agreement of August 1, 1892, between the Terminal Association and the Chicago, Peoria & St. Louis Railway, by which the former was to give the latter certain storage room, acted as a conveyance of the tracks of the Terminal to the Chicago, Peoria & St Louis Railway If this is so, then it follows just as logically that if the receiver entered into an agreement with the consignees, whereby he was to give them certain storage room for their

barley, this also acted as a transfer to them of the tracks, and made those tracks the private tracks of the consignees.

If these were the private tracks of the consignees, then it cannot be questioned but that the placing of the cars thereon by the receiver constituted a delivery to them.

IV.

The cars and contents were delivered to and accepted by the Terminal.

While we admitted above, for the sake of argument, that the agreement for storage was between the receiver and the consignees, *still we insist, as a matter of fact, it was between the consignees and the Terminal.* The question then arises, were these cars delivered to the Terminal?

(a) Pursuant to custom the cars were set to a designated place of deposit.

The record shows beyond any question that the cars were hauled by the receiver to a point on a certain "Y" belonging to the Terminal, where according to the custom existing between the two carriers, the latter sent its own servants with its own engine and took physical possession of the same (R. p. 231). In addition to this, it was the custom of the Terminal to take a record of all such cars deposited on this "Y."

George H. Phelps, local agent of the Terminal at East St. Louis, sworn in behalf of the petitioners, testified as to the exact location of each car at the time of the fire. (R. p. 83)

> Q. "Now you have a list of these cars; will you designate on which tracks these various cars were standing *at the time of the fire*, as near as you can.
>
> A. *I can give you the track each car stood on; they stood on the tracks from 40 to 50, and I can give you the individual car numbers and the tracks they were on.*"

The witness then did so, naming each car and each track (R. pp 83-4-5). This shows a definite knowledge on the part of the Terminal of these cars being on their tracks. How did it come to know that these cars were there if it had nothing to do with them? The fact is they took a record of such cars every day, and even knew what trains of the receiver the cars would come in on (R p 85)

> A. "I can't say what track that was on; that car arrived on train 37, and it was not set on these tracks until after our records were taken, so I am not able to say."

In another place counsel for petitioners asked Mr. Phelps if he had examined the records, and could state when the seventeen cars of the C. M. & St. P. Company, involved in this controversy, arrived at East St. Louis, to which he replied he could, and proceeded to do so. (R. pp. 105-106.)

And this was not the mere personal knowledge of the witness, as appears on cross-examination (R. p. 108), but was obtained from the records of the Terminal.

> Q. "Did you know personally about each of these cars, as to whether they had been, or not, delivered?
>
> A. Consulted the records.
>
> Q. Who made the records?
>
> A. Clerks in our employ."

Again, on cross-examination, this is further established. (R. p. 93.)

> Q. "In designating these tracks in red on the blue print, and the cars standing upon them, did you do so on your own knowledge, or from information derived from others?
>
> A. From records taken from our yard clerk.
>
> Q. When were the records made up, before or after the fire?
>
> A. Both before and after the fire; that day and in the morning after the fire."

But opposing counsel would, of course, say that this fact of the Terminal making a daily record of these cars as they were set on their tracks, was of no significance, and that beyond question it did not show a delivery of them to the Terminal. Such a contention might have weight if it did not further appear from the petitioners' own evidence that the Terminal, when it made these records, ***entered these cars therein as having been delivered to it on the very day of their arrival in these yards.*** This is shown by "Ex C." identified by, and made a part of the test-

mony of Mr. Phelps, the agent of the Terminal. (R. p. 114) From this transcript of the records of the Terminal appears the car number, "initial, date arrived J. S.-E. date delivered, bridge, date of billing C., P. & St. L. to Eads bridge"

A reference to this record *made by the Terminal acknowledges delivery to it* of the cars arrived, at the certain minute on the *same* day, and does not show a new way-bill under the head "date of billing" for days and weeks after the "delivery."

The delivery thus acknowledged was, of course, the delivery made pursuant to the original manifest or way-bills providing for through carriage, as for instance, from La Crosse to East St Louis, and at the destination therein named.

This record is not of the particular cars in controversy, but was introduced by petitioners *to show the custom* of handling this class of business, and is a fatal admission on the part of the Terminal that it was the "*custom, practice and usage*" for it to consider cars set to this "designated place of deposit" *as delivered to it* for the purpose of storage, *without further notice.* If the record of the Terminal for these particular *cars did not* show such a delivery, opposing counsel *would certainly have introduced it.*

In support of this we rely on the law, as laid down by this Honorable Court in the case of *Pratt vs. Grand Trunk Railway, 95 U. S., 43.* There the goods

had been shipped from Liverpool to St. Louis in packages marked "P. & F. St. Louis." They were carried by the Grand Trunk Railway to Detroit, where they were destroyed by fire, under circumstances almost identical with the facts in the case at bar. A delivery was held to have been made to the connecting carrier. In the opinion of the court it is said:

> "At the time the fire occurred the defendant had no freight room or depot at Detroit, except a single apartment in the freight depot of the Michigan Central Railroad Company. Said depot was a building several hundred feet in length, and some three or four hundred feet in width, and was all under one roof. It was divided into sections or apartments, without any partition wall between them. There was a railway track in the center of the building, upon which cars were run into the building to be loaded with freight. The only use which defendant had of said section was for the deposit of all goods and property which came over its road, or was delivered for shipment over it. This section, in common with the rest of the building, was under the control and supervision of the Michigan Central Railroad Company, as hereinafter mentioned. The defendant employed in this section two men, who checked freight which came into it. All freight which came into the section was handled exclusively by the employees of the Michigan Central Railroad Company, for which, as well as for the use of said section, said defendant paid said company a fixed compensation per hundred weight. Goods which came into the section from defendant's road, destined over the road of the Michigan Central Railroad Company, were, at the time of unloading from defendant's cars, deposited by said employees of the Michigan Central Railroad Company in a certain place in said section, from which they were loaded into the cars of said latter company by said employees when they were ready to receive them; and, after they were so placed, the defendant's employees did not further handle said goods. Whenever the agent of the Michigan Central Railroad Company would see any goods deposited in the section of said freight building set apart for the use of the defendant, destined over the line of

said Central Railroad, he would call upon the agent of the defendant in said freight building, and, from a way-bill exhibited to him by said agent, he would take a list of said goods, *and would then, also, for the first time learn their ultimate place of destination*, together with the amount of freight charges due thereon; that from the information thus obtained from said way-bill in the hands of the defendant's agent, a way-bill would be made out by the Michigan Central Railroad Company for the transportation of said goods over its line of railway, and not before.

These goods were, on the 17th of October, 1865, taken from the cars and deposited in the apartment of said building used as aforesaid by the defendant, in the place assigned as aforesaid for goods so destined.

At the time the goods in question were forwarded from Montreal, in accordance with the usage in such cases, a way-bill was then made out in duplicate, on which was entered a list of said goods, the names of the consignees, the place to which the goods were consigned, and the amount of charges against them from Liverpool to Detroit. One of these way-bills was given to the conductor who had charge of the train containing the goods, and the other was forwarded to the agent of the defendant in Detroit. On arrival of the goods at Detroit, the conductor delivered his copy of said way-bill to the checking clerk of defendant in said section, from which said clerk checked said goods from the cars into said section. It was the practice of the Michigan Central Railroad Company, before forwarding such goods, to take from said way-bill in the custody of said checking clerk, in the manner aforesaid, the place of destination and a list of said goods and the amount of accumulated charges, and to collect the same, together with its own charges, of the connecting carrier."

In commenting on this case, and in applying the rule of law there laid down to the facts in the case at bar, his Honor, Judge Showalter, in his dissenting opinion, filed in the Court of Appeals, (R p 401) says:

"It will be seen from the foregoing statement that on the course of dealing between the two carriers, *shipping directions had not been received by the connecting carrier*,

The court mentions the mark on the goods, but not as a controlling factor in the decision. The Michigan Central Railroad Company did not look at the marks on the goods for the shipping directions upon which it acted. Under the mode of dealing between the two carriers, the case was the same as though there had been no marks on the packages. The goods were on the platform of the connecting carrier at the time of the loss. The defendant did not own or have any possessory right over that portion of the connecting carrier's station house. Defendant's servants were not privileged either to unload the goods there or to handle the goods afterwards. The servants of the connecting carrier placed all goods which were to be forwarded as designated by the agent of the defendant at a particular locality on the platform in question. The defendant ceased to be and the connecting carrier became the bailee of the goods—*and this before the shipping directions had been given by the one carrier to the other according to the understood mode of dealing between them.* This was a case in which the defendant did not own or possess the unloading platform. If the defendant had owned or possessed that section of the station where the goods were unloaded, the mere placing of the goods in controversy at a particular locality on the platform, from which the servants of the connecting carrier would afterward, without special license from the defendant, take them, would not have changed the custody of such goods. The law upon this point is clear. Nor would the connecting carrier have become bailee even if its agent had received the shipping directions before the destruction of the goods. The fact that the goods were still in the custody of the defendant would, from the standpoint of the shipper, have determined the matter. I may add, that the Grand Trunk Railway Company had no terminal, that is to say, unloading facilities at Detroit, so far as concerned the owner of the goods in question. The section of the station in which the freight of the Grand Trunk Railway Company was unloaded, was owned and possessed by the connecting carrier. In the case at bar, the connecting carrier not only took exclusive possession of the cars in controversy at the terminus of appellant's rails, but hauled them to a point on its own rails to which appellant had, neither in law nor by contract, even a right of access."

It must be remembered that the purpose for which the cars were delivered was not for further transportation, *but for storage*, and therefore no such strict rule as to delivery of way-bills is required. Opposing counsel admit that the consignees had interrupted their transit, and had agreed (with somebody) that the cars should be stored here at East St. Louis.

(b) It was immaterial whether the Terminal knew the contents or fresh destination of these cars.

Opposing counsel argue that the Terminal could not know the contents of these cars, their destination or who the consignees were, until it had received the new way bill, and therefore it could not know whether it was holding them for the consignees. If the Terminal had accepted them, would the fact that it did not know the consignee and the fresh destination, relieve it of the warehouseman's duty to care for them? Would either of those facts change the care and custody back to the receiver, or alter the liability of the Terminal, which attached the moment it accepted the cars? We hardly think a court of equity would release a carrier (which had *actually* accepted cars) from liability for their care, simply because that carrier had not yet been notified of the contents and destination. Courts of law have not even gone to that extent, as is shown in *Illinois Central vs. Smyser, 38 Ill., 354.*

But in point of fact, the Terminal Company must have known from the first minute of its recorded relations to these cars, not only their contents, but also their destination. The vital fact, fully disclosed in the evidence above, that the Terminal had its "yard clerk" always on hand at the arrival of every train, to note and record the day, hour and minute of the incoming of each car; *each of which was covered by a separate way-bill*, (R. pp. 170, 171, 174) necessarily involved an inspection thereof, by which knowledge of contents and destination, including name of consignee, were all obtained. This conclusion is rendered all the more certain from the fact that such inspection would naturally have been made in order to show which cars were to be handled free, which were to be subject to the fifty cents charge for handling, which were to be sent on at once, and which were to be set to store.

The record here shows that it was customary for the Terminal to take certain of these cars and to hold them pending re-sale and a fresh destination. The consignees were expecting shipments daily, and for the very purpose of having them stored until they could dispose of them, they entered into this agreement with the Terminal. The Terminal was to take these cars as fast as they arrived, and were set to their tracks. After the consignees had sold the grain and were ready to give fresh destination, and make a new way-bill, they would be ready to move the grain,

and consequently would have no further occasion to store it; the storage was between the arrival and the making of a new way bill; after that the service was carriage, and not storage.

(c) Issuing of way-bill was not necessary to constitute delivery.

It is the contention of opposing counsel that, notwithstanding the actual physical delivery to the Terminal Railroad Association, the receiver was responsible for the cars and contents up to the time he issued a new way-bill for them and passed that way-bill on to the Terminal Association. Our reply is that *at most* such way-bill is simply evidence of delivery, which may be shown by other competent evidence. Therefore, we insist that it is wholly immaterial and technical to object, that prior to the fire no new way bill had been passed over to the Terminal Company.

No case can be found in which, for the purpose of delivery, it is held that a way-bill is necessary, except where that way-bill is for the purpose of conveying to the connecting carrier information as to the ultimate destination. In this case the cars were not delivered for further transportion, but were for storage, and no ultimate destination could be given to them until the consignees had made a sale of the barley in St Louis and re-consigned it. For any other purpose, at most, such way-bill is simply evidence of delivery and does

not constitute the delivery, and therefore, if actual and physical delivery had been made it can be shown by other evidence. This is established in those cases in which goods are delivered to a railroad company to be held by them awaiting orders for transportation.

In the case of *Illinois Central vs. Smyser, 38 Ill., supra,* where goods had been placed in a car of the railroad company with its assent for the purpose of shipment, the loaded car being under the exclusive control of the company, the court held that the goods thereby passed into the possession of the company as effectually as if they had been delivered in its warehouse. In that case the same contention was made as to bill of lading not having been delivered as in the case at bar. On that point the court said:

> "It is not the mere signing of a bill of lading which transfers the possession of freight to the company, but it is evidence that they have received possession. Their possession may be shown by any other legitimate evidence."

V.

The agreement with the Terminal Association was not a lease by which the Receiver's rails were extended into East St. Louis.

Opposing counsel sought to meet the prima facie case of delivery thus made by the receiver, by construing the agreement which existed between the Ter-

minal and the receiver as a lease of the rails of the former to the latter, and upon this base their argument that the car, at the time of its destruction, was still in the possession of the receiver.

We desire to recur to the fact that the rails of the receiver terminated at a station called Bridge Junction, and did not extend south of the road marked "Stockyards Avenue" on the plat opposite page 112, in the record. Opposing counsel have assumed from the statement in the first clause of this agreement, that the Terminal Association "undertakes to give the party of the second part terminal facilities at East St Louis," that the receiver had no terminal facilities at the terminus of his line. This assumption is unwarranted by the facts In connection with this shipment it was not considered necessary to show that the receiver had terminal facilities at the end of his line, since these shipments were not expected to be handled in the receiver's yards at the terminus of his rails, but from the first were intended to be "set to" the tracks of the Terminal Association, as the next connecting carrier. Therefore, no direct evidence of terminal facilities was introduced. However, by a reference to the "plat of railway yards" in this record (R. p. 112) it will be seen at the bottom of the plat, and toward the middle, the beginning of yards marked "J. S. E. freight yards."

"J. S. E." was the common name by which the railroad operated by the receiver had theretofore been known. (R p. 21.) This identity is also shown by the fact that the line of railroad belonging to the C., P. & St. L. Railway is designated on this plat as the "Jacksonville Southeastern R R." These "J. S. E. freight yards" are referred to and identified by the testimony of the receiver himself, (R p. 239) and opposing counsel tried hard to get him to say that he had no terminal facilities, but did not succeed. Therefore, this agreement was not entered into for the purpose of supplying any deficiency in the line of railroad which the receiver was operating to comply with his common law obligations as a carrier.

The agreement was simply for the purpose of securing a certain and definite rate to be paid to the Terminal Association for switching through cars to and from the rails of the receiver and other companies in the vicinity of East St Louis, and to provide beforehand for the ample and quick handling of such through freight, so that the receiver's own terminal facilities would not become clogged or over-taxed by the accumulation there of such through freight in addition to that which was purely local and destined only to East St. Louis.

In this connection it is well to consider the nature of the railroad of the Terminal Association, and the character of the business that it solicited and carried

on. By a glance at the plat (R. p. 112) it will be seen that the rails of the Terminal connect with all of the many railroads centering in East St. Louis; this taken with the name of the Association points directly to the fact that it is a switching railroad, which serves all other railroads centering in East St. Louis by delivering cars from one to the other.

As a matter of fact, it could have been shown that the Terminal Railroad Association has the same sort of an agreement with every other railroad entering East St. Louis, as it has with the receiver.

Unless, therefore, it can be said that the mere fact of the Terminal Association being a switching railroad, whose main business is simply the switching of cars from one railroad to another, prevents it from assuming the character and liability of a connecting carrier for the cars while they are in its possession in the course of such transportation from one railroad to another, then we submit that the existence of such an agreement as that of August 1, 1892, does not in itself change the relations between the Terminal Association and other railroads from which it receives cars.

In *Missouri Pacific R. R. vs. Grocery Co., 55 Kan. 525*, we find a logical statement of the reason why the mere fact that a railroad is a switching railroad does not relieve it of the liability of a connecting carrier.

In that case a car load of sugar sent from Louisiana was consigned to the plaintiff, a grocery company at Witchita. It was shipped over the Texas & Pacific Company's line, and was brought to Wichita by the St. Louis& San Francisco Company. It was there placed on the "Y" and switched by the defendant company over its tracks to the spur track in the rear of the plaintiff's warehouse, for which service the St. Louis & San Francisco Company paid their regular switching charge of two dollars per car. The court held that the defendant was liable as a common carrier for a loss occurring after it had taken charge of the shipment, and before the plaintiff had had reasonable time in which to remove it, among other things saying:

> "A railroad transporting a passenger or a car load of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight or passenger train. The fact that compensaton for this particular service was paid by the St. Louis & San Francisco Railroad Company, while it might render that company also responsible, it could not relieve the defendant company from its liability as a carrier."

To sustain the contention that the agreement of August 1, 1892. excluded the relation of connecting carriers, between the two companies. or that the contract itself made them respectively principal and agent as to the interchange of all traffic between them, it is absolutely necessary to ignore the fourth provision of the contract which is: (R. p. 111.)

> "Fourth. All cars consigned to and from the East St. Louis freight house of the party of the second part,

> to be switched to and from the Wiggins Transfer tracks without extra charge. Regular switching charges and rules to apply to all other cars to and from connections, the party of the first part to be governed in making its collections by instructions shown on bill to it, as to who should pay. In the absence of any instructions the switching charges will follow the car."

This clause expressly recognizes and provides for that interchange of traffic which occurs between connecting carriers, and by it provision is made that the regular switching charges and rules shall apply on all cars, to and from connections; that is, that the regular switching charges shall apply to certain cars which necessarily had to pass over the tracks of the Terminal Association to the tracks of other railroads connecting with the latter.

Now, it is to be remembered, that this contract does not provide that *certain* yards or *any special* place or territory in the yards of the Terminal Association are to be set aside for the *exclusive* use of the receiver, *in the sense that he was to exercise any dominion over or have any possessory right therein.* Nor does the evidence, in fact, show that any particular portion of the yards were set aside for the *exclusive* use of the receiver.

John Weidmer, of the Gratiot Street Warehouse Company, testified that he rented of the Terminal Association a warehouse which was right in the middle of that part of the Terminal's yards, which opposing counsel refer to as the appellant's "portion" of these

yards; that some of the tracks ran through the warehouse; and that he rented from the Terminal on the understanding that it had full control. (R. pp. 212, 213.)

The servants of the Terminal Association may have been accustomed to haul cars from the receiver's road to some special territory in the yards of the Terminal, and that territory may for the time being have been "the yards set aside for the use" of the receiver, within the sense of the second section of the contract, ***but such servants did not do this by any direction from the receiver;*** nor was any right in him to direct or control them, or to designate the place on the grounds, or rails of the Terminal Association where any car received from his road should be at any given time in any way recognized (R. p. 109-201) ***This was the construction given to the contract and acted on by the parties.***

The agreement will be searched in vain for words of conveyance. There can not be found in it any transfer of any estate in the grounds or tracks, or any part thereof, or of any possessory interest in its engines, or control over its servants, from the Terminal Association to the receiver.

The conduct of the Terminal Association at the very fire which caused this great loss, emphasizes the absence of any attempt on the part of the Terminal to make any such transfer by this agreement. As soon as the fire broke out, the receiver had an engine

close by on its own rails, and his employees attempted to go in and hitch on to these cars and pull them away from the burning warehouse, but were prevented from so doing by the employees of the Terminal (R. p. 193). The evidence further shows that while a great many of the cars which came off of the receiver's road were set on to certain tracks by the Terminal Association, yet it further shows that this was not always the case, and that the Terminal would take the cars to any part of its vast yards which was most convenient to it, and there mingle them with cars from other railroads, and that after the Terminal had taken possession of such cars on the designated "Y," the receiver could in no manner direct the point to which they were to be transported on the rails of the Terminal. (R. p. 197-201) In other words, the evidence conclusively shows that the receiver had no use, direction or control over any portion of the Terminal yard.

Therefore, we earnestly submit, that the contract in question is nothing more than the result of precautionary measures on the part of the receiver for the prompt and adequate handling of *through* freight by his connecting carrier, the Terminal, and *beyond this* is nothing more than a *a division of the freight charge between the two connecting carriers.* As his honor, Judge Showalter, in his dissenting opinion, filed in the Court of Appeals, said (R p. 397):

> "As said above, the shipper pays no more than if the appellant had himself owned and operated the lines of

the Terminal Association. Such a contract could not interfere with or modify the legal obligation of either carrier to a shipper whose goods are handled successively by both. Neither appellant nor the Terminal Association could evade or alter any legal obligation to a third party by any contract between themselves. If the Terminal Association had alienated to appellant an actual ownership or possessory right over that portion of its tracks where the cars in controversy were destroyed, and such a control over its employees and engines, that said employees, when engaged in handling the cars in question, were the servants of appellant, and the engine used by them his engine for the time being, the case would be different. On this hypothesis, the tracks where the cars were distroyed would have been appellant's tracks, the employees who hauled the cars to that point his servants, the engine used by them his engine, he would have continued to be the bailee of the property, and the matter of way-bills or junction reports would have signified nothing. But in my judgment, as said, *the contract in question had no force as of alienation* by the Terminal Association to appellant of any possessory right, interest or estate in or over any property of the former company, or of any control over its servants. Neither the relation of lessor and lessee, nor that of licenser or licensee existed between these parties as resulting from said contract so far as it concerned the cars and contents in question."

VI.

The Agreement between the Receiver and the Terminal did not make them Principal and Agent.

It was also argued in the courts below that the agreement of August 1, 1892, between the Terminal Railroad Association and the Chicago, Peoria & St. Louis Railway Company, made the former the agent of the latter. In the opinion of his honor, Judge Jenkins, it will be seen that he also is inclined to this view.

From an inspection of this agreement (R. p. 111) it will be found that the Terminal Railroad Association only agreed to furnish necessary yard room and track facilities in their yards at East St. Louis, for the purpose of handling such freight as might originate on the line of the Chicago, Peoria & St. Louis Railway Company, or be received by that railway company from other lines, to be carried to St Louis or points beyond St. Louis, over the rails of the Terminal Association. For this service the Terminal was to receive the customary charges for the handling of each car, just as any other connecting carrier would receive.

A case which is analogous to the one at bar, is *St. Louis Insurance Company vs. St. Louis, Vandalia, Terre Haute & Indianapolis R. R. Co., 104 U. S., 146*, There this court held that an arrangement between a Dispatch Company and sundry railroad companies, whose lines terminated at New York, whereby the latter, separately, agreed to carry all goods for the transportation of which the former should contract, at the established tariff rates, did not involve a joint liability on the part of the railroad companies, nor make the Dispatch Company the agent of the railroad companies, the court saying:

> "The Dispatch Company and the defendant had, it is true, certain business relations, but those relations did not necessarily involve an agency upon the part of the former for the latter, in the making of contracts for transportation. The agreement between those companies only bound the railroad company to 'receive, load and

> unload, deliver and way-bill' such freight as was sent to it by the Dispatch Company, and at the rates established, not by the latter, but by the defendant and other railroad companies."

So, we submit, in the case at bar, that the agreement between the receiver and the Terminal Railroad Association only bound the latter to properly take care of and handle all freight which the former might deliver to it on the designated "Y," and at the rates established, not by the receiver, but by the Terminal.

It might as well be argued that every railroad company which enters into an agreement with a coal company to furnish it so many cars a day, and to haul those cars at a certain price, thereby becomes the agent of the coal company, or thereby leases to it the cars and that portion of the rails necessary to make the haul contemplated.

(a) The appellant did not pay the Terminal for storing these cars.

Opposing counsel predicate their "theory of agency" existing between the appellant and the Terminal, as to the handling of these cars, on the unwarranted *assumption* that the appellant paid the Terminal fifty cents a car. We quote from petitioner's brief (p. 15):

> "The Terminal Company, therefore, acted merely as the *servant or agent* of the receiver in breaking up his trains and placing the cars on certain tracks for which

> it received from the receiver fifty cents a car. *Ordinarily, one railway company does not pay to another railway company fifty cents a car for the privilege of delivering cars to it.*"

Notwithstanding the fact that their own witness (R. p. 87) testified that this service of making and breaking trains was a "separate and distinct service" from the storage, and notwithstanding the fact that no loss occurred during the "breaking" of the trains, or by reason of its negligent performance, and notwithstanding, therefore, the matter is wholly irrelevant and immaterial, we think that there is no basis in this record for the ***assumption*** that the appellant paid the Terminal fifty cents a car for these cars.

Mr. Phelps testified (R. p. 82) generally that this work was done under a contract at fifty cents per car. The contract referred to (R. p. 111) provides that the work done shall be:

> "at the rate of fifty cents per loaded car in and out, *except cars on which the party of the first part receives a bridge toll, which will be handled free.*"

If, as contended by opposing counsel, all these cars were destined to St. Louis, every one of them would be cars "on which the party of the first part" (the Terminal) would receive a bridge toll, and which in consideration of its receiving such toll, ***and not in consideration of payment by the appellant,*** the Terminal handled these particular cars. Was then such handling, by the Terminal, *for itself,* or as agent of the receiver?

Clearly for itself, as principal. And for the further reason that it solicited and secured this business from the grain brokers in St. Louis, solely to prevent its coming down on the west side of the river, in which event they would have received no toll. (R. p. 261-3.)

VII.

The custom existing between railroads as to liability for cars is the law.

Opposing counsel say that the claim for the cars destroyed rests on a somewhat different ground than do the claims for barley destroyed. They state the rule correctly as to the system of car book-keeping, and also that where a car has been delivered to a connecting carrier, until such delivery *is so reported*, the car shall stand *charged* to the company last reported as having received it. But there is no agreement between railroads by which a mere *charge* of this kind can *create and establish a liability* for the car. We hardly take it that counsel meant to assert such a proposition. They do, however, further state that if a car is destroyed while on the tracks of that company, such company shall be liable therefor the same as it would be for any other property. To this we assent, because it merely states a well known rule of law.

We therefore submit that the argument of opposing counsel, that there is a liability in the receiver for these cars simply by reason of the fact that there was a failure to *notify* the Chicago, Milwaukee & St. Paul Company of their delivery to the Terminal, and therefore that the C., M. & St. P. Company on their car books still had the receiver *charged* with them, is by no means tenable.

If this were so, liability could be created and divested by a simple means of bookkeeping, *without ever moving a car a foot*. We know that opposing counsel would not agree that if, even in this case, the receiver had sent in a report that these cars had been delivered to the Terminal, that therefore the receiver was relieved of all liability, and that liability was vested in the Terminal.

This is but an argument based upon constructive delivery of the cars by junction reports, and the freight by way-bills, which was thoroughly submitted at the hearing. The danger of adopting such a theory is at once apparent, since if it is held that delivery depends upon the issuing of junction reports, and if no junction reports have been issued no delivery has been made, then a railroad company could divest itself of liability by merely issuing such reports, although, in fact, it had not delivered the cars. The question of liability, both as to cars and freight, is the same, and depends upon the actual possession.

The Supreme court of Illinois held, in *Peoria Ry. vs. Chicago Railway, 109 Ill., 135*, that a carrier of cars holds the same relation to the cars as it does to the freight, and on the oral argument of these cases in the Court of Appeals. opposing counsel assented to this principle, and we find this case cited in their original brief filed in that court, and in this court.

In *Railway Company vs. Railway Company, 123 Ill., 594*, it is expressly held that if cars had been set on the private delivery track belonging to the consignees, for loading or unloading. then they are in the possession of the consignee, and consequently its liability is interrupted during the time they are so out of its possession. These cars were set on the tracks of the Terminal Railroad Association out of the possession and control of the receiver and for the purpose of storage awaiting a fresh destination from the consignees by express agreement between them and the Terminal Association.

CONCLUSION.

At the conclusion of opposing counsel's brief an appeal is made to this court based on their own bad judgment in suing the wrong carrier. Citing the predicament of Bromley in *Midland Ry. vs. Bromley, 8 J. Scott, 372*, and as usual charging his last sad plight to the court and not to the error of his counsel. they ask this court, solely for the purpose of saving their clients, to

unjustly charge the receiver with the loss. If they have deliberately turned their back upon a plain, well defined and highly equitable right of action against the Terminal Railroad Association, through whose gross negligence the loss was occasioned, and which right of action still exists, and in the end find themselves in Bromley's condition, surely, they have nobody but themselves to blame.

The court will not, however, look in vain for the motive which impelled counsel to select for an opponent in these suits the receiver, representing a small bankrupt railroad, instead of the Terminal Association, a large and powerful corporation virtually controlling all entrances to St. Louis. From the beginning of this litigation, the record shows a deliberate combination between the Chicago, Milwaukee & St. Paul Railway, the one *prima facie* liable as the initial carrier, and the Terminal Association, clearly liable as the carrier upon whose rails and through whose gross neglect the loss occurred, for the inequitable purpose of imposing the liability on this respondent (R. p. 108, 138, 183).

In conclusion we submit that the petitioners have not brought their cases within any of the well settled rules laid down by this court for the granting of certiorari. That in addition to this the cases have been vigorously fought from beginning to end, full written briefs were submitted and oral arguments made at the hearing in the Court of Appeals; that the cases

were there given mature and deliberate consideration; and lastly that the judgment of that court on the merits of the cases is in harmony with decisions of this Honorable Court, and is right and just.

Respectfully submitted.

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Phelps Barton Warren

Solicitors for Respondents.